S. HRG. 100-314

BROADCASTING IMPROVEMENTS ACT OF 1987

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COMMUNICATIONS

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

S. 1277

TO AMEND THE COMMUNICATIONS ACT OF 1934 REGARDING THE RESPONSIBILITIES OF BROADCASTING LICENSEES, AND FOR OTHER PURPOSES

JULY 17 AND 20, 1987

Printed for the use of the Committee on Commerce, Science, and Transportation

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BROADCASTING IMPROVEMENTS ACT OF 1987

FRIDAY, JULY 17, 1987

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON COMMUNICATIONS,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room SR-253, Russell Senate Office Building, Hon. Ernest F. Hollings (Chairman of the Committee) presiding.

Staff members assigned to these hearings: Toni Cook and Tom Cohen, staff counsels; and Katherine Meier and Regina Keeney, minority staff counsels.

OPENING STATEMENT BY THE CHAIRMAN

The CHAIRMAN. The committee will please come to order.

Common sense. For too long, common sense has been drowned out by the deregulatory refrain. Our policy makers have been mesmerized by its ring and have placed great faith in it. However, deregulation is not the ultimate goal—the public interest is. Now, we are seeing that all of deregulation's promises have not come to pass, and many of the benefits have been accompanied by problems.

Common sense now returns to correct what has gone wrong. Early this year, the Commerce Committee reported legislation dealing with transportation safety and drug use. In recent months, we reported legislation on the matter of airline safety. Here today, we continue our work to address problems in the broadcast industry.

The Federal Communications Commission has adopted the theory that broadcast stations, like household appliances, should be regulated only by market forces. We are constantly assured that the marketplace will protect everyone, that somehow efficiency equals justice. Well, the facts demonstrate otherwise.

Broadcasters used to be the epitome of the local citizen, dedicated to serving the community. Many still are. But, lately we have seen the emergence of a new generation of broadcasters—who seem to care only about attention to the bottom line on their balance sheet. These broadcasters are beginning to dominate the industry. Even those dedicated to public service have felt its effects. It is sort of like Gresham's law—bad broadcasters drive the good broadcasters out of business.

Because of its unquestioned belief in free market dogma, the FCC has demonstrated that it is unwilling to use its authority and obligation to monitor the broadcast marketplace to ensure that broad-

casters serve the public interest. For example, the Commission's new policy on character qualifications prohibits the Commission from even investigating certain past misconduct of potential licensees where that misconduct did not involve the business of broadcasting. The result is that the Commission has effectively abdicated its responsibility to ensure that new owners will operate their stations in the public interest.

Contrary to the Commission's position, government oversight is absolutely essential. I know many broadcasters also believe this to be true. The public trust requirement benefits them.

The Broadcasting Improvements Act is intended to begin the process of restoring and providing some meaning to the public trust requirement. At the same time, it will also reduce some of the burdens on broadcasters that are no longer warranted. This legislation represents a return to common sense.

We intend to ensure that the regulatory process does, in fact, work to enhance the quality of service provided to the public. That process is not working now, and we intend to fix it.

[The bill follows:]

100TH CONGRESS
1ST SESSION

S. 1277

To amend the Communications Act of 1934 regarding the responsibilities of broadcasting licensees, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 27, 1987

Mr. INOUYE (for himself and Mr. HOLLINGS) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

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A BILL

To amend the Communications Act of 1934 regarding the responsibilities of broadcasting licensees, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Broadcasting Improvements Act of 1987".

TITLE I—RENEWAL OF BROADCAST LICENSES

RENEWAL OF A LICENSE

SEC. 101. (a) Section 309 of the Communications Act of 1934 (47 U.S.C. 309) is amended by adding at the end the following:

"(j)(1) In any case in which a radio broadcasting station licensee submits to the Commission an application for renewal of its license, the Commission shall grant such application if it finds that, during the preceding term of its license—

"(A) the licensee's programming, as a whole, has been meritorious and has responded to the interests and concerns of the residents in its service area, including through the coverage of issues of local importance;

"(B) the operation of the station by such licensee has been free of willful or repeated failure to observe any provision of this Act or any rule or regulation promulgated under this Act; and

"(C) the licensee continues to meet the qualifications prescribed under section 308(b) of this Act.

"(2) In any case in which a television broadcasting station licensee submits to the Commission an application for renewal of its license, the Commission shall grant such application if it finds that, during the preceding term of its license—

"(A) the licensee's programming, as a whole, and the nonentertainment programming and the programming directed toward children have been meritorious and have responded to the interests and concerns of

the residents in its service area, including through the coverage of issues of local importance;

"(B) the operation of the station by such licensee has been free of willful or repeated failure to observe any provision of this Act or any rule or regulation promulgated under this Act; and

"(C) the licensee continues to meet the qualifications prescribed under section 308(b) of this Act.

"(3) The Commission shall randomly select 10 per centum of the television applications for renewal of a broadcast license in each calendar year for review under this paragraph. Each licensee submitting an application selected for review shall submit to the Commission the records maintained under section 102 of the Broadcasting Improvements Act of 1987 with regard to a period of one month during each year since the most recent renewal of such license, or since the date the station commenced operation, whichever is longer. The Commission shall review each renewal application selected, including the records and materials submitted, in order to ensure compliance with the standards specified in paragraph (2) of this subsection.

"(4) In making the determinations required by paragraphs (1) and (2) of this subsection, the Commission shall not consider whether the public interest, convenience, and

necessity might be served by the grant of a license to a competing applicant for the facilities involved.".

(b) The amendment made by subsection (a) of this section shall take effect six months after the date of enactment of this Act, and shall apply to applications filed on or after such date.

IMPLEMENTATION OF REVISED BROADCAST LICENSE RENEWAL PROCEDURES

SEC. 102. The Federal Communications Commission shall, not later than six months after the date of enactment of this Act, promulgate rules and procedures implementing the standards set forth in section 309(j) of the Communications Act of 1934, as added by section 101 of this title, and requiring every broadcast license to maintain records indicating the issues of interest and concern to the residents in its service area, and the meritorious and responsive programming broadcast by such licensee, including the coverage of issues of local importance and including, for television broadcast licensees, the nonentertainment programming and the programming directed toward children. Each such licensee shall annually place copies of such records in the public files of the station. Such records shall be in addition to the materials required under sections 3526 and 3527 of part 73 of title 47 of the Code of Federal Regulations (47 CFR 73.3526 and 3527).

LIMITATIONS ON FINANCIAL SETTLEMENTS

SEC. 103. (a) Section 309 of the Communications Act of 1934, as amended by section 102 of this title, is further amended by adding at the end the following:

"(k)(1) If an application for a broadcast license filed under subsection (a) or an application for renewal filed under subsection (j) of this section is pending before the Commission, it shall be unlawful for the applicant who filed such application and any other person to enter into any agreement under which such other person withdraws or withholds from filing a petition to deny or informal objection with regard to any such application in exchange for the payment or promise of money or any other thing of value by or on behalf of such applicant, unless the consideration for such withdrawal or withholding is an agreement involving no monetary consideration and the agreement is approved by the Commission.

"(2) In accordance with such regulations as the Commission may prescribe, the prohibition specified in paragraph (1) of this subsection shall not apply to amounts legitimately and prudently expended or to be expended in connection with preparing, filing or advocating any such petition to deny or formal objection.

"(3) For purposes of this subsection, an application shall be deemed to be pending before the Commission until an

order of the Commission is no longer subject to rehearing by the Commission or review by any court.".

(b) The amendment made by subsection (a) of this section shall take effect ninety days after the date of enactment of this Act, and shall apply to applications filed on or after such date.

TITLE II—BROADCAST OWNERSHIP STABILITY

PERIOD OF OWNERSHIP

SEC. 201. Section 307 of the Communications Act of 1934 (47 U.S.C. 307) is amended by adding at the end the following:

"(f) If, upon examination of an application for consent by the Commission to an assignment of a broadcast construction permit or license or the transfer of control of a corporate permittee or licensee, the Commission finds that the station involved has been operated on-air by the current licensee or permittee for less than three years, the application shall be denied unless—

"(1) the application involves only an FM translator station or FM booster station;

"(2) the application involves a pro forma assignment or transfer of control;

"(3) the assignor or transferor has made an affirmative factual showing, supported by affidavits of a person or persons with personal knowledge thereof, that

establishes that, due to death or disability of station principals, or unavailability of capital or other materially changed circumstances affecting the licensee or permittee occurring subsequent to the acquisition of the license or permit, consent by the Commission to the proposed assignment or transfer of control will serve the public interest, convenience and necessity; and

"(4) the permit or license was authorized in accordance with any rule, regulation, or policy referred to in section 402 of the Broadcasting Improvements Act of 1987.".

TITLE III—MANDATORY CARRIAGE OF BROADCAST SIGNALS

EXPIRATION OF MANDATORY CARRIAGE

SEC. 301. (a) The Federal Communications Commission shall, not later than ten days after the date of enactment of this Act, amend rules promulgated by the Commission requiring the mandatory carriage of qualified television broadcast signals to delete the expiration of such requirement contained in section 64 of part 76 of title 47, Code of Federal Regulations (47 CFR 76.64). Such amendment shall take effect on the date on which such amendment is made.

(b) The Federal Communications Commission shall undertake a study to determine the impact of the rules regarding mandatory carriage of qualified television signals con-

tained in part 76 of title 47, Code of Federal Regulations, on cable and over-the-air television. Such study shall be completed and transmitted to the Congress not later than December 31, 1992.

TITLE IV—DIVERSIFICATION IN OWNERSHIP OF BROADCAST STATIONS

CONSIDERATION OF CERTAIN APPLICANTS

SEC. 401. (a) Section 309 of the Communications Act of 1934, as amended by this Act, is further amended by adding at the end the following:

"(l)(1) Except as provided in subsection (i) of this section, in the granting of authorization to construct and operate broadcast stations for which there is more than one application, the Commission shall award—

"(A) a substantial enhancement credit to any applicant which is wholly owned or controlled by one or more women who will be integrated into the daily management of the broadcast station; and

"(B) an enhancement credit, greater than the credit provided under subparagraph (A) of this paragraph, to any applicant which is wholly owned or controlled by one or more members of a minority group who will be integrated into the daily management of the broadcast station.

"(2) For purposes of this subsection, the term 'minority group' has the meaning given to such term in subsection (i)(3)(C)(ii) of this section.".

GRANTS OF CERTAIN CERTIFICATES AND DISTRESS SALES

SEC. 402. The Federal Communications Commission shall not eliminate any rule, regulation or policy in effect on May 1, 1987—

(1) with respect to the granting of certificates under section 1071 of the Internal Revenue Code of 1986 for the sale or exchange of broadcast properties to entities owned or controlled by one or more members of a minority group; or

(2) with respect to the sale, prior to commencement of a hearing, of a broadcast station by a licensee whose license has been designated for a hearing regarding revocation or renewal to an entity wholly owned or controlled by one or more members of a minority group at a price substantially below its fair market value.

MULTIPLE OWNERSHIP OF BROADCAST STATIONS

SEC. 403. The Federal Communications Commission shall not repeal or in any way alter the rules regarding multiple ownership contained in section 3555 of part 73 of title 47, Code of Federal Regulations (47 CFR 3555), as in effect on May 1, 1987.

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TITLE V—MISCELLANEOUS PROVISIONS

EXCHANGE OF BROADCAST STATIONS

SEC. 501. The Federal Communications Commission shall take no action to diminish the number of VHF channel assignments reserved for noncommercial educational television stations in the Television Table of Assignments contained in section 606 of part 73 of title 47, Code of Federal Regulations (47 CFR 73.606).

The CHAIRMAN. As the distinguished Senator from New Jersey says, we will start with the guys with the white hair, you and me.

Senator Lautenberg, we welcome you to the committee, and we would be delighted to hear from you at this time.

STATEMENT OF HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM NEW JERSEY

Senator LAUTENBERG. Thank you, Mr. Chairman, Senator Packwood.

I am pleased to come before you today to applaud you for your initiative in holding these hearings to review broadcasting legislation. I would like to address two important public goals that are not being met, and I would like to suggest to the committee some legislative responses.

First, broadcasters are failing to serve the needs of the children. And the FCC, frankly, is letting them get away with it.

Second, we have not done enough to promote diversity of ownership of broadcasting properties. Instead of doing more, the FCC is looking for ways to do less.

Mr. Chairman, there is a common thread that joins these two issues. In both cases the marketplace alone will not achieve our goals. In both cases, however, the FCC has been so blinded by its faith in the marketplace that it cannot see the facts.

We have all heard the statistics that by the time the average student graduates from high school, that child has spent more time watching TV than in the classroom. Television can help educate and inform our kids and excite their curiosity about the world around them, or it can grow for the Nation a crop of couch potatoes.

America's educational system must work harder and harder to prepare our children to compete. Television's potential looms even larger. Broadcasters should work to fulfill that potential to educate and inform. That is their legal obligation. They get to use the

public airwaves. As public trustees, they should serve the public interest.

Mr. Chairman, commercial television broadcasters have failed the children of this Nation. They air precious little programming directed toward children, even less of some educational or informational value.

When you look at the market's incentive, their performance is not a surprise. Broadcasters sell commercial time to advertisers who want to reach people who spend money. Children simply are not the most valuable audience. Left to their own devices, broadcasters will sell children short. Indeed, broadcasters who want to serve children do so at their commercial peril. And when they do program for children, they often do it through program-length commercials. They come up with new programs that will interact with toys. Their goal is to sell products. As one toy company executive told TV Guide, the shows are part of the overall marketing effort.

Now, this is a classic case that justifies regulation. What boggles the mind is that the FCC cannot see it. Thankfully, the U.S. Court of Appeals has told the FCC—a quote here—"The Commission cannot not now cavalierly revoke its special policy for youngsters." It cannot brush aside the kids with an incantation of marketplace rhetoric.

It is long past the time that Congress should step in. Today I am reintroducing legislation, along with Senator Wirth to set a standard for broadcasters asking for seven hours a week of educational and informational programming. Failure to meet the standard would be grounds for a petition to deny. The broadcasters would then have to show that, despite its failures to meet the guideline, it has met its obligation to children.

The bill would also require the Commission to commence inquiries into program-length commercials and interactive programs. The FCC should be looking at this, and we should not let it be ignored.

Mr. Chairman, I recognize that S. 1277 attempts to address the broadcaster's obligation to children. Those who air meritorious children's programming and meet a number of other tests unrelated to children shall get their license renewed. But who is to say what is meritorious? The same FCC that has already dropped the ball. I think we need to be more specific. While I recognize that the broadcasters do not even want to see the children mentioned at all, we need to do more.

Mr. Chairman, just as we cannot leave it to the market to take care of our children, we cannot leave it to the market to insure diversity of ownership. And diversity of ownership promotes diversity of views. Blacks, women, Spanish language broadcasters serve needs that others do not meet. They address issues that others do not. They speak to an audience that others ignore. And it is important.

It was obvious to the Congress when it wrote preferences into the law on lotteries. It was obvious to the courts when they upheld minority preferences. But it was not obvious to the FCC.

The FCC launched an inquiry. They asked, do we need special incentives, special preferences to promote diversity of programming? The answer is that we do. The Congress said we do, and until this

FCC, the FCC said we do. But the rule today at the FCC seems to be if you do not like what Congress has said, ignore it.

One statement in the FCC's notice of inquiry is telling. The FCC said—and I quote—"We solicit comment on whether the Commission is bound by congressional findings of constitutionality." This FCC seems to think that it can put itself above the Congress and above the courts. It seems to think that it can declare laws unconstitutional and refuse to enforce them.

It is going to take an act of Congress it seems to codify the rules on minority preferences. And that is why I introduce S. 1095. It would set in law rules on minority and women preferences. It would codify the rules on distress sales and tax certificates for minorities and extend them to women.

Now, I know that some will point to abuses in the program, and we should root them out. They do not mean that the policy is wrong. They mean the FCC is not policing it. We have come a distance from the days when minority hands held almost no broadcast outlets. As recently as 10 years ago, there were less than 60. Now there are over 200. But that 200 plus amounts to just 2 percent of the licenses. We have a long way to go, and the Congress should make sure we get there.

Mr. Chairman, we have let the FCC and the administration undermine some basic goals of our Nation's communications policy. One goal is to serve children; another is to promote diversity. With your leadership we passed legislation to codify the fairness doctrine. I think that was a turning point. It showed that the Congress may be ready to reassert itself into this area. The airwaves are a limited, valuable and powerful public resource. It is our job to make sure they are used for the public's benefit, and I am ready to work with you to make that happen.

The CHAIRMAN. Well, we appreciate your statement very much, Senator. You brought it into sharp focus that public office is a public trust. I hate to read the morning paper. You would not think so. But in any event the public office of the Federal Communications Commission does have a trust responsibility. They seem to want to dissolve into an auction scheme with no public responsibility, all on the fetish of government.

I do not want to go into my ritual about how the broadcasters themselves asked for this government because they tried it without the government with the open market approach in the teens and the early 1920s and had chaos. There are many of them. The majority of them sitting around out here now think they own that spectrum. The public owns the spectrum, and our zeal for the freedom of speech is for the freedom of the public's speech, not the broadcaster's speech. The broadcaster has the control of the station.

And what happens if you do not have some response to the public trust—what has been built up by regulation will be ruined. There is no question that the broadcast media in America, both television and radio, has reached outstanding heights. And we, the public have been spoiled. We take it for granted. Now we see that it is not necessarily as good as it used to be.

I know the public complains about clutter. You cannot turn on the Saturday night movie or the Monday night movie, or whatever

it is, unless they interrupt it with five ads fore and five ads aft, and a break in between. And then if you are putting on more advertisements, Senator, you are getting more money. And at the same time you are turning the public away from broadcasting. You go over there and buy a tape. You get sick and tired of that. Why listen to what they put on whatever night? Go down and buy a tape so that you are not interrupted and then you do not listen to any ads.

And those that are the greedy with the five ads fore and the five ads aft, they are the ones that destroy the viewing public that has been built up by regulated broadcast media. And it is an unfortunate fetish around here now that it is being destroyed with this deregulate, deregulate, deregulate. So, unfortunately, we are going to have to restore some of the public trust by way of regulation I take it because greed steps in in that old market and they destroy the dedication.

And the bill that has come about by the old time—I am talking about old-time broadcasters. We got a whole new crowd that has come to town that does not have any idea of broadcasting anything. They can look and those MBA programs they put on up at Harvard tell how to make that profit, and bam, bam, they buy it and sell it, and turn it around. Sixteen licenses were bought and sold within a year last year for millions. The average sales price is $40 million.

So, yes, we are making a lot of money for a lot of people, but this deregulation fetish has really begun to destroy the wonderful broadcast media we have had. So, we do thank you for your presentation.

Let me yield to my distinguished former chairman here.

Senator PACKWOOD. I find the Chairman's remarks a continuum of the remarks he has been making for 10 years. And mine are probably the same. There is no dispute between us as to whether or not the public owns the airwaves. They clearly do. You can call it a trust relationship if you want. I would simply say what is the best way for the government to manage the utilization of those airwaves. The Chairman would more heavily regulate it than I would.

I would use the same analogy in interstate commerce. We have the right to regulate trucking if we choose. Almost a decade ago we chose to deregulate it almost totally, but not quite. And I think the public has been well-served by the deregulation. The question simply is is the public better served by statutory regulation, FCC regulation, in terms of the airwaves or are they better served by more deregulation. I would chose the latter.

The Chairman mentions the Saturday night movies and the five commercials fore and the five commercials aft and five in the middle, and finally people go out and buy video cassettes and watch them so that they do not have to watch the commercials. My hunch is, if that trend continues, there will not be as many commercials on the Saturday night movies. The advertisers simply will not buy them if they have no audience. It is a good marketplace decision. And I think the public is well-served by that kind of a decision.

But this debate is going to go on forever I think. There are those who do not trust broadcasters to make appropriate decisions in the public interest. They think only we or the FCC can make decisions in the public interest and that we know better than the broadcast-

ers what the public wants. Or maybe what we are really saying is we know better than the broadcasters what the public ought to have and we are going to tell the broadcasters what the public ought to have rather than letting the public decide for themselves by spinning the dial.

Senator LAUTENBERG. Mr. Chairman and Senator Packwood, I think it is fair to say that I know Senator Hollings' views very much about where government ought to be and where it ought not to be. And I think that probably the three of us share a relatively common view that as much as possible, the government ought to butt out. But I think it is also fair to say that when you are talking about a limited public resource, I think it is our responsibility, if we judge it to be abused in any way, that we ought to step in.

All of us have an attitude that a vibrant business sector in our society is essential to a free nation and particularly to the way we like to live. But when we see communities abandoned by deregulation in the airlines, we have to ask ourselves a question. Is the only yardstick the bottom line?

And I think when we talk about TV, Senator, and we talk about the reduced amount of educationally enhancing TV, programming that stimulates the mind for children, TV that captures their time, TV that becomes a second member of the family in many cases, babysitting, when a mother has to go out to work and often has to leave a youngster in the care of someone else or by themselves, and the TV is the communications medium, I would submit to you that as long as there is not an option for choosing channel after channel after channel to find something that would stimulate that child to think about things other than guns and killing and violence, to find programming free of commercial taint, I think that we do have to take a look.

And I am not suggesting overregulating the broadcasters. What I am suggesting is that FCC step in there and see what the problem is and analyze it and see that the resource is being appropriately used for the public interest. That is the point.

And I think that we would all share the view that the less government that we have, the better off we are going to be. Where there is a free market that is an honest market, let it go. If there is a monopoly market out there controlling a very limited resource, then I think the situation changes.

The CHAIRMAN. Thank you very, very much, Senator. We appreciate it.

The committee is pleased this morning to have the Chairman of our Federal Communications Commission and also Commissioner Quello. We welcome Chairman Patrick and Commissioner Quello. Chairman Patrick, you can proceed please.

STATEMENT OF HON. DENNIS R. PATRICK, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION, ACCOMPANIED BY JAMES H. QUELLO, COMMISSIONER; DIANE KILLORY, GENERAL COUNSEL; AND BILL JOHNSON, ACTING CHIEF, MASS MEDIA BUREAU

Mr. PATRICK. Thank you, Mr. Chairman, and good morning.

I have with me at the table in addition to Commissioner Quello, Diane Killory, our general counsel, and Mr. Bill Johnson, who is

acting chief of our Mass Media Bureau who may be helpful in answering some of the questions that the committee may have this morning.

I have an opening statement, if I might proceed with that, Mr. Chairman.

The CHAIRMAN. Very good. You can summarize it, highlight or deliver it in full, as you wish.

Mr. PATRICK. It is a somewhat abbreviated version of the written statement which I submitted to the committee.

The CHAIRMAN. The complete statement will be included in the record, and you can go ahead with the summary.

Mr. PATRICK. Thank you, Mr. Chairman.

I am very pleased to present the views of the FCC on the Broadcasting Improvements Act of 1987 and would like to focus my comments this morning on the portions of this bill dealing with the comparative broadcast license renewal process.

To begin with, I applaud Congress in its efforts to examine this area. We all agree, it seems, that the process is in need of serious reform. In my testimony I will address the major shortcomings of the current process and suggest specific provisions. At the conclusion of my testimony, I will, of course, be happy to answer any questions you may have.

Under the current system, at the end of a broadcast station's license term, a challenger may file an application for a radio or a television station that competes with an incumbent's license renewal application. This requires a comparative hearing on the relative qualifications of each applicant. In these hearings, the applicants are compared on several factors. These include the extent to which grants of either application would promote diversification of control over mass media outlets, that is, which applicant owns fewer stations or media outlets; the degree to which owners would participate in full-time management positions at the station; and the applicant's effective use of spectrum.

Another important and influential factor is whether the incumbent licensee is entitled to a renewal expectancy based upon its past record of service to the community. An expectancy is warranted if an incumbent's record of serving the needs of its community of license has been meritorious and not otherwise characterized by any serious broadcast-related derelictions. This is essentially a programming-based expectancy, with the strength of the expectancy dependent upon the level of service, such as whether it is substantial or superior.

Defining the precise parameters in ascertaining the existing licensee's satisfaction of the service standard has proven to be an intractable task. It is an inherently subjective and difficult process that engages us in a subjective review of the incumbent's programming. As a result, the cases have produced highly variable results, even among different reviewers of the same broadcast record.

For example, in one case an incumbent's past record was found to be acceptable by an administrative law judge, superior by the Commission, and average by the Court of Appeals—three institutions all attempting to apply the same standard.

We agree with this subcommittee that the comparative renewal process is badly in need of reform for a number of reasons. First, it

engages the agency in a comparison between an incumbent with a proven record of performance and a challenger's promises of performance. Such a comparison may have little relation to which applicant will, in fact, provide better service to the public.

Second, the current system causes First Amendment concerns because it requires a critical evaluation by the Commission of a licensee's programming. This subjective evaluation may affect the licensee's programming decisions and, as a result, is the antithesis in some regards of our notions of free speech.

Third, the ambiguity and uncertainty in the process create the opportunity for abuse, both by the government through its ability to reward certain points of view in its evaluation of programming, and by private parties who can file competing applications knowing they have little to lose and much to gain.

Fourth, the process is unreasonably expensive, both for the applicants and for the Commission, and in that regard disserves the public interest.

Given these serious imperfections in the present system, the critical question, of course, is what are the alternatives. We have devoted, you should know, a great deal of effort in the past to improve the process. Starting in the mid-1960s, we tried to escape the subjectivity of program evaluation by requiring formal procedures for ascertaining community needs, but found that that process produced a quagmire of paperwork without justifiable benefit to the public.

We also explored the possibility of adopting quantified programming obligations in order for incumbents to obtain an expectancy, but abandoned this idea because it was a simplistic approach to a complex problem, among other reasons.

Finally, we have in recent years sought to clarify what levels of service are meritorious and thereby deserving of a renewal expectancy. Although some progress has been made through the adjudicatory process, the long-standing difficulties of the comparative renewal process and of precisely defining "meritorious" remain.

We believe the intent of the comparative renewal portion of this legislation—to create a proper balance between the public interest obligations of broadcasters and broadcasters' interests in maximizing service to the public by operating in an unfettered marketplace—is laudable. Moreover, we agree with the procedural mechanism proposed by the bill, a two-step approach, because this generally eliminates the need to conduct the comparative renewal hearings, thereby reducing costs and uncertainties.

Nonetheless, we are concerned that the bill would continue the Commission's substantive oversight of broadcasters' programming. Our concern arises specifically from its proposed codification of the current meritorious service standard as a basis for non-comparative renewal, thus requiring Commission review of both the quantity and the quality of programming.

In addition, the bill requires that 10 percent of all television license renewal applications filed in any given calendar year be audited to determine whether the meritorious standard has been met, again raising the same problems.

To fashion a workable solution, two overriding principles should be borne in mind. First and foremost, the process should acknowl-

edge the capacity of competitive broadcast markets to assess and respond to the programming needs and interests of the public.

Second, this effectiveness of the market should permit the Commission to disengage from the intrusive programming review inherent in the current system and to replace it with a process that properly accommodates First Amendment values. Such an approach would seek to afford broadcast journalists the full protection now available to print journalists, and would benefit the public by ensuring access to the information necessary for an informed public.

Given these goals, I believe that we could reform the comparative renewal process by moving away from the present renewal process and by looking instead to an incumbent's compliance with the Communications Act and the Commission's rules and policies as a better basis for granting renewal expectancies.

The question arises as to what procedure should be utilized to achieve that goal. One workable approach might be a two-step procedure similar to that contained in S. 1277. If a licensee substantially complies with the Act and our regulatory requirements, and does not suffer any disqualifying character defects, its license would be renewed and no comparative process would be engaged. Petitions to deny could, of course, be filed, but no competing applications would be accepted at that stage.

This approach would afford an incumbent a reasonable level of certainty in order to encourage investment and programming efforts, and would avoid the uncertainty and First Amendment related problems inherent in the present system. It would also eliminate many needless and costly comparative proceedings, enabling licensees to devote their resources and energy to tasks that more directly benefit the listening and viewing public.

In conclusion, our experience suggests that consumer welfare is best served by a renewal mechanism that removes the uncertainty and the intrusive and chilling effect of government supervision of speech and places more reliance on the competitive broadcast market to ensure that broadcasters' programming meets the needs and interests of the public. The modified two-step approach I have suggested to you will do this, while still retaining the government's ultimate responsibility to determine whether an incumbent broadcaster has operated in the public interest and therefore merits renewal.

That concludes the summary of my statement, Mr. Chairman. I will be happy to answer any questions the committee may have. I think at this time, however, Commissioner Quello does have a statement if that would please the committee.

[The statement and questions follows:]

STATEMENT OF HON. DENNIS R. PATRICK, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

Good morning, Mr. Chairman and Members of the Subcommittee. I am pleased to present the views of the FCC on the Broadcasting Improvements Act of 1987. This bill has numerous important facets, one of which—the antitrafficking provisions—I have already addressed in testimony before the Subcommittee on Telecommunications of the House Commerce Committee. This morning, I would like to focus my comments on another crucial aspect of this legislation, those portions of S. 1277 that deal with the comparative broadcast license renewal process. I certainly applaud

Congress in its efforts to examine this area. The Commission firmly believes that the license renewal process is in need of serious reform. In my testimony today, I will address some of the shortcomings of the current process and suggest some basic principles that I believe deserve careful attention in trying to improve the process. At the conclusion of my testimony, I will, of course, be happy to answer questions as to all aspects of the bill. As a final introductory matter, I must note that the comparative renewal process is currently under review in a pending Commission proceeding (MM Docket No. 81-742). My comments here should not be taken as prejudging the outcome in that proceeding; rather, they reflect my broad concerns in the renewal area and my initial views on approaches that could improve the existing process.

THE EXISTING PROCESS

At the outset, it might be helpful to provide an overview of the existing comparative renewal process and the basic premises that now underpin it. The current system provides that, at the end of a broadcast station's license term, a challenger may file an application for a new radio or television station that is mutually exclusive with an incumbent station's license renewal application. In a mutually exclusive situation, a comparative hearing is held on the relative qualifications of each applicant. In this hearing, the qualifications of both the incumbent and the challenger are compared on many factors that are, with the notable exception of the renewal expectancy, also used in hearings to compare applicants for new radio and television stations. These factors include the extent to which the grant of any particular application will promote diversification of control over mass media outlets. Under this criterion, demerits may be assessed for other interests of applicants and their principals in a wide variety of broadcast and other media entities. The significance of any demerit depends upon the degree of control of the media outlets involved, as well as their location relative to the community for which a license is sought.

Another important comparative factor is the extent to which owners are integrated into full-time management positions at the station under review. This criterion may also be enhanced by various other factors, including past or proposed local residence of participating owners in the community or service area applied for; the degree to which minority and female owners may participate in station management; past broadcast experience of these integrated owners; and past or present participation in civic affairs.

A third area of comparison is the applicants' efficient use of the spectrum, which entails examining differences in the actual or proposed coverage of the stations to unserved or underserved areas and populations and/or differences in overall coverage.

A final and influential factor in comparative renewal hearings is whether the incumbent licensee is entitled to a "renewal expectancy" based upon its past record of service to its community of license. This factor, available only to incumbent licensees, is considered in recognition of three policy considerations. First, in a comparative renewal hearing between an incumbent and a challenger, a challenger's proposals may not match the incumbent's proven performance and may even result in an inferior level of service. Second, licensees are not likely to make investments designed to ensure quality service unless past service to their communities is rewarded. Third, not recognizing a legitimate renewal expectancy could lead to a random restructuring of the broadcast industry which may not serve the public interest.

Under the current state of the law, a renewal expectancy is warranted if an incumbent's record of serving the needs of its community has been "meritorious" and not otherwise characterized by any serious broadcast-related derelictions. Defining the precise parameters and ascertaining existing licensee's satisfaction of this service standard has proved to be an intractable task. It is an inherently subjective and difficult process that engages us in a review of the incumbent's programming. No means of objectively measuring a broadcaster's programming performance exists. As a result, the cases have often produced highly variable results—even among different reviewers of the same broadcast record. For example, in one case, an incumbent's past broadcast performance was found to be "acceptable" by an Administrative Law Judge, "superior" by the Commission, and "average' by the court of appeals. *Central Florida Enterprises, Inc.* v. *FCC,* 598 F.2d 37 (D.C. Cir. 1978), *reh. en banc denied and modified,* 598 F.2d 58 (D.C. Cir. 1978), *petition for cert. dismissed,* 441 U.S. 957 (1979).

Beyond these difficulties, the Commission must also decide the weight that should be accorded to the expectancy when compared to the other comparative factors pre-

viously discussed. Generally, if an incumbent has rendered a "meritorious" level of service, it receives a comparative preference weighed against, and many times outweighing, the other factors.

CURRENT PROBLEMS

A broad consensus has developed, I believe, that this comparative renewal process is badly in need of reform. Although not all parties emphasize the same points, this collective judgment generally rests on one or more of the following objections.

First, the existing process engages the agency in comparison that may bear little relation to which applicant will in fact best service the public. The incumbent, already disciplined by market forces and party to the unavoidable compromises that operating in the real world requires, faces the promises of the challenger unencumbered by anything other than the need to carefully groom and polish its presentation. From an evidentiary point of view, the challenger can look to the full record of the incumbent station's operations during the entire license term, while the existing licensee can do little but speculate on the likely performance of its putative replacement. This places the decisionmaker in the untenable position of comparing the challenger's promises with the broadcaster's actual performance.

Second, because the process requires a critical evaluation by the Commission of the program performance of the existing licensee, the renewal mechanism raises substantial First Amendment concerns. The often decisive nature of the renewal expectancy, and the highly subjective character of the standards utilized in awarding it, only exacerbate these concerns. Broadcasters, in making the day-to-day programming choices inherent in their endeavor, must inevitably consider not only their editorial predilections, but also the impact of their choices on their chances for renewal. This constant possibility of governmental retribution for errors in programming judgment is the very antithesis of "free speech."

Third, the current renewal mechanism contains within it a number of perverse incentives, that is, incentives to act in a manner inconsistent with behavior the Commission has found furthers the public interest. For example as part of our effort to comply with the Paperwork Reduction Act and to permit licensees to focus on activities of direct benefit to the public, the Commission eliminated comprehensive program logging obligations for broadcast licensees in its radio and television deregulation orders. But licensees faced with the prospect of a potential challenge at renewal and the need to document their rebuttal of any competing applicant's allegations face a strong counterincentive to record meticulously their program activities. Similary, we have relaxed our multiple ownership rules in part in the belief that increased group ownership can lead to economies of scale and efficiencies that serve the public interest and could also increase the possibility of viable competition to the major networks. Yet, the comparative renewal process continues to award demerits on diversification grounds to group owners, notwithstanding the fact that their ownership structure fully complies with the Commission's rules. Also, the license renewal process gives licensees a clear incentive to conform, to dilute their views, to pursue the "middle of the road," in the belief that such an approach, by its unobtrusive nature, will deflect unwanted regulatory attention at renewal time. Yet such a result is directly at odds with the goal of the Commission and, indeed, the goal of the First Amendment itself, to afford listeners a diversity of viewpoints and ideas.

Fourth, and generally, the ambiguity and uncertainty in the process create the opportunity for abuse, both by the government, should it attempt to reward certain points of view and punish others, and by private parties, who can file competing applications knowing they have little to lose and much to gain simply by creating a measure of anxiety for the incumbent licensee.

Fifth, and last, the process is unreasonably expensive. It has been estimated that the average cost in legal fees for a radio station comparative licensing proceeding exceeds $500,000 and that those for a television station exceed $1.0 million. During the 1970's, the average proceeding lasted almost 8 years and gathered a record exceeding 5,000 pages.

In response to these problems, some might be tempted to suggest that a more aggressive, efficient and committed regulatory agency is all that is needed to make the process work. At an earlier time that might have been a persuasive argument, but the Commission has now had more than 50 years of experience with the process. That is long enough, I think, to indicate that it is the process itself, not agency inefficiency, that is the problem.

FAILED ALTERNATIVES

Given, then, that the existing system displays serious imperfections and should be substantially revised, the critical question is what better alternatives are there? The question is not novel. Substantial efforts have been devoted in the past to improving upon the comparative renewal process. In endeavoring again to reform this process, it is instructive to examine approaches that have proved unavailing.

Starting in the mid-1960's, the Commission made a major effort to eliminate the subjectivity of the program evaluation process at the core of the license renewal mechanism by adopting highly formalistic ascertainment rules. Under these rules, licenses were required to ascertain the needs and interests of their communities and formally record these findings. They were then to be held to the provision of programming responsive to these ascertained needs. The Commission thus hoped to concentrate on reviewing compliance with the ascertainment process as a means of assuring that broadcasters' programming performance addressed the problems, needs and interests of the public. The process, however, produced only a quagmire of paperwork without discernible benefit to the public. The digest of cases dealing with the process alone comprised nearly 60 pages, most dealing with what the Commission later described as "meaningless minutiae." For example, the Commission was required to consider numerous and often trivial allegations regarding the manner in which licensees conducted surveys of community leaders or the general public to ascertain community needs and the representativeness of the samples used. As a result, the ascertainment process was eliminated in the broadcast deregulation orders.

In 1970, the Commission attempted to cut away the extraneous baggage from the process by introducing a summary judgment step into the comparative hearing. Under this approach, an existing licensee that could demonstrate that its operations had been substantially attuned to meeting the needs and interests of its area during the preceding license term and that the operation of the station was not otherwise characterized by serious deficiencies was entitled to a summary judgment and license renewal. The Commission's 1970 *Policy Statement*, however, was overturned by the Court of Appeals as denying competing applicants their full hearing rights in a proceeding that the Commission ostensibly treated as a comparative process. *Citizens Communications Center* v. *FCC*, 447 F.2d 1201 (D.C. Cir. 1971).

In frustration with this process, the Commission next explored simply adopting quantified programming obligations in order to obtain a renewal expectancy. But this effort too was abandoned as leading down the wrong path and, as the Commission noted, was a "simplistic, superficial approach to a complex problem." *National Black Media Coalition* v. *FCC*, 589 F.2d 578 (D.C. Cir. 1978).

Finally, the Commission sought, under prodding from the Court of Appeals, to simply define with greater precision what levels of service could be said to be meritorious or substantial and therefore entitled to the award of a renewal expectancy. While some progress has perhaps been made in this area through adjudications decided over the years, the subjectivity of the process cannot and has not been eliminated. Moreover, the longstanding difficulties of the comparative renewal process—government involvement in program review and its "chilling" effect on speech, unpredictability, the incomparability of actual performance versus promises of performance, and high cost—remain.

CONCERNS WITH S. 1277

We believe that the intent of the comparative renewal portion of this legislation—to create a proper balance between the public interest obligations of broadcasters and broadcasters' interest in maximizing service to the public by operating unfettered in the marketplace—is laudable. Morever, we agree with the procedural mechanism proposed by the bill for broadcast license renewal—a two step approach—because this generally eliminates the need to conduct comparative renewal hearings, thereby reducing costs and saving Commission resources. Nevertheless, we are concerned that the bill would continue the commission's substantive oversight of broadcasters' programming. Our concern arises specifically from its proposed codification of the current "meritorious" service standard as a basis for non-comparative renewal, thus requiring Commission review of both the quantity and quality of a station's programming. The problems inherent in such programming oversight are further exacerbated by the bill's requirement that 10 percent of the television license renewal applications filed in any given calendar year be audited to determine whether the "meritorious" service standard has been met. These features of the bill raise First Amendment concerns along the lines previously discussed and will, of necessity, require the Commission to continue making subjective judgments as to whether

an incumbent's service has been "meritorious," thus subjecting the process to the problems and abuses I mentioned earlier.

A SUGGESTED ALTERNATIVE

In attempting to fashion a workable alternative to the existing license renewal process, several overriding principles should be borne in mind. First, and foremost, the process should acknowledge the incentive of a broadcaster in a competitive broadcast market to assess and respond to the programming needs and interests of the public. Governmental regulation is not necessary to ensure the availability of programs that viewers and listeners want. The marketplace will generally sort out the interests of audiences and match them with appropriate programming and will do so more efficiently than governmental dictates. Today's robust broadcast marketplace is particularly reliable in this report. Between 1965, when the Commission first articulated its policies on comparative hearings, and 1986, the number of radio and television broadcast stations has grown by approximately 95 percent and 136 percent, respectively. More signficantly, during this time, FM broadcasting has evolved into a service competitive with AM broadcasting and UHF television has become a significant factor in the television marketplace. And we anticipate that this growth will continue. The Commission has allocated 689 new FM channels, and has permitted the shared use of Class I-A clear frequencies which could ultimately result in the addition of more than 100 new AM stations. AM channels immediately above the existing AM band should also become available in the next few years as a result of international treaty negotiations. It is estimated that this may result in the addition of several hundred new AM stations nationwide. There are, moreover, 341 low power television (LPTV) stations now licensed, and we estimate that as many as 4000 LPTRV stations may eventually be licensed. The broadcast market is thus highly competitive today.

This growth in electronic media outlets is important not just because it provides an environment of multiple information sources from which audiences can choose and which they can influence through their viewing choices. It is important as well because the growth in media that are not subject to traditional broadcast regulation—particularly the growth in cable television, which serves nearly half of all U.S. television households, and the rapidly rising penetration of videocassette machines—means that regulatory or legislative pressure on broadcasters to air programs that are deemed "socially desirable" will not necessarily increase the audiences for such programming. Rather, the audience may simply be driven to the alternative program sources.

The intensity of the competition in the broadcast marketplace and the reliability of markets in ensuring the availability of responsive broadcast programming should permit us to disengage from the intrusive programming review now at the heart of the renewal process and to fashion a license renewal process that more fully accommodates First Amendment values. More specifically, I believe that we can accommodate the need for reasonably certain, predictable renewal mechanism that fairly evaluates an incumbent's performance, yet avoids the content-based judgments that have previously characterized that process. How? By simply looking to a licensee's compliance during the preceding license term with the Communications Act and the Commission's rules and policies. This approach involves a two part process: if a licensee substantially complies with the Act and our regulatory requirements, and does not suffer any disqualifying character defects, its license would be renewed and no comparative process would be engaged; petitions to deny could, of course, be filed, but no competing applications would be accepted at this stage. If, on the other hand, significant deviation from these obligations had occurred, the licensee either would be disqualified or would be compared to competing applicants.

This approach would afford incumbents a specific standard to which to conform their conduct. Moreover, by providing a reasonable level of renewal certainty, it would encourage investment and programming efforts by existing licensees. Yet, it would still test the overall conduct of licensees against our regulatory requirements, and deny noncomparative renewal where that conduct is substandard. This bifurcated process would also eliminate many needless and costly comparative proceedings, thus allowing licensees to devote their resources and energy to tasks that more directly benefit the listening and viewing public. It would also substantially reduce the government's role in reviewing directly the program performance of licensees, thus better conforming our regulatory scheme to the ideals of the First Amendment and thereby, in my view, better serving the broadcast audiences of our licensees.

CONCLUSION

I applaud your attempts to reform the comparative renewal process—it sorely needs it. I urge you to consider in any such reformation the alternative I have described here. Our experience suggests that consumer welfare, our ultimate objective, is best served by renewal mechanism that removes the uncertainty and the intrusive and chilling effect of government supervision of broadcast speech and places more reliance on competitive broadcast markets to ensure that broadcasters' programming meets the needs and interests of its viewers. The modified 2-step approach I have suggested to you would do just this, while still retaining the government's ultimate responsibility to determine whether an incumbent broadcaster has operated in the public interest and therefore merits renewal.

Thank you for the opportunity to appear before you this morning. I would be happy to answer any questions you may have.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

August 21, 1987

Honorable Daniel K. Inouye
Chairman
Senate Subcommittee on Communications
227 Hart S.O.B.
Washington, D.C. 20510

Dear Mr. Chairman:

In Chairman Patrick's absence, I am responding to the follow-up questions due today which we received after the Subcommittee's July 17, 1987 hearing on S. 1277, the "Broadcasting Improvements Act of 1987." Also enclosed are responses to matters raised during the hearing itself.

I hope these answers are fully responsive to the Subcommittee's questions. Please let us know if you need any further information or assistance to complete the hearing record.

Sincerely,

Peter K. Pitsch

Peter K. Pitsch
Chief of Staff

Enclosures

BROADCASTING IMPROVEMENTS ACT
Hearing Questions

Renewal

Q[1]: Do you believe that broadcast licensees should be held to a public interest standard?

A: Broadcast licensees, unlike other business owners, are subject to regulation by the Communications Act, which is carefully tailored to further the public interest by promoting a system of broadcasting that, as a whole, serves and is responsive to the needs and interests of the listening and viewing public. The Commission is charged with, and I will carefully enforce, this legislation. Further, in our view, responsive broadcast service is most likely to result where regulatory intervention in workably competitive broadcast markets is minimized generally and government oversight of program content in particular, is, for reasons associated with the First Amendment, avoided.

Q[2]: Do you believe that the Commission can evaluate whether a licensee has been serving the public without considering the stations programming?

A: Both statutory and existing regulatory requirements require some evaluation of the content of a station's programming. Traditionally, some form of review of broadcasters' programming performance has played a role in Commission licensing proceedings and in certain types of broadcast enforcement actions. Given the substantial First Amendment concerns raised by direct governmental review of broadcast programming, however, the Commission has consistently sought to achieve its program-related objectives by indirect and less intrusive means. For example, we now consider the general programming responsiveness of licensees by relying on the lists of community issues and the most significant related programming that all broadcasters are required to prepare. These lists are placed in station public files on a quarterly basis so that they remain current and are easily available to the public. Other types of direct program review, such as the subjective review as to whether certain programs are meritorious which is currently utilized in comparative-renewal proceedings presents greater tensions vis-a-vis the licensee's First Amendment rights.

Q[3]: Can you explain how a member of the public could demonstrate that a licensee's programming has not been serving the public under the Commission's present rules?

A: Individual licensees remain obligated to provide programming that is responsive to the community. Therefore, issues such as general programming responsiveness, programming responsiveness to the child audience, and compliance with statutory programming-related obligations such as Section 315 "equal time" and sponsorship identification requirements are presently

subjects of Commission concern. A member of the public may raise these issues with respect to a Commission licensee by filing a petition to deny, an informal objection or a complaint. There are strict time and documentation requirements that attach to the filing of a formal petition to deny that are not applicable to informal objections or complaints.

In the Commission's television deregulation decision, Report and Order, 98 FCC 2d 1076 (1984), recon. denied, 104 FCC 2d 358 (1986), aff'd in part and remanded in part, Action for Children's Television v. FCC, No. 86-1425 (D.C. Cir. June 26, 1987), revising programming and commercialization policies, ascertainment requirements, and program log requirements for commercial television stations, the Commission specifically addressed what a petitioner to deny would have to show to raise an issue as to whether a licensee's programming is responsive to the public. The Commission stated that a petitioner raising programming issues will have to demonstrate that an individual station is failing to address issues facing the community in its programming. The Commission emphasized, however, that the obligation of a licensee in this context is to contribute to the overall information flow in its market, not to provide programming responsive to every issue of community interest or concern. Thus, while this obligation is not negated by the existence of other issue-responsive programming in the market, it may be affected by the amounts and types of programming provided by other television broadcasters. Further, while a petitioner may allege that an individual station has failed to address issues of particular relevance to a significant segment of the community, the Commission stated that a licensee may respond by pointing not only to its own programming that may have addressed such issue, but also to other television stations available in the community that could reasonably have been relied upon to address such issues.

Q[4]: Can you tell the Subcommittee how many renewal applications were challenged each year from 1980 to the present, and how many were designated for hearing. In addition, can you provide us with the number of renewal applications the Commission has denied since 1980?

A: On August 13, 1981, the Omnibus Budget Reconciliation Act was enacted into law. Pub. L. 93-35, 95 Stat. 357. As part of a cost reduction effort, Section 307(d) of the Communications Act of 1934 was amended so as to lengthen the maximum three year license term for radio and television broadcast stations. Commencing with licenses scheduled to expire on October 1, 1981, the broadcast renewal terms for television and AM and FM stations were extended to five and seven years, respectively. Section 73.1020 of Commission rules organizes licenses so that stations in certain groups of states come up for renewal simultaneously. As a result of the legislation extending license terms, there have been few licenses scheduled for renewal during the period in question. In particular, we received applications during the period October 1986 to August 1, 1987 for 6 television renewal groups, consisting of a total of 421 television renewal applications. 342 of these were granted, and 79 applications (19%) were initially deferred. The reasons for deferral included questionable licensee Equal Employment Opportunity programs (22 stations);

licensee failure to submit an RF radiation statement (12 stations); licensee bankruptcy (2 stations); silent stations (7 stations); late-filed renewal applications (3 stations); and licensees opposed by competing applications for construction permits (2 stations). A total of 7.4% of the deferred stations (31 stations) were the subject of a petition to deny or substantial informal objection. This percentage reflects the filing of 8 petitions to deny or substantial informal objections. These petitions to deny and informal objections are now being processed.

Since 1980, a total of 55 comparative-renewal cases, 6 revocation cases, and 5 non-comparative renewal cases have been designated for hearing. (The renewal designations included applications filed prior to 1980.) Since 1980, no renewal application in a case designated for hearing has been denied by the Commission. Two renewal applications designated for hearing have, however, been dismissed by the Commission, the effect of which was to deny renewals to licensees. Further, to date approximately 17 renewal applications that have been designated for hearing during this period have been denied by an Administrative Law Judge. Appeals to the Commission in these cases are presently pending or expected.

Q[5]: Since 1980 has the Commission ever investigated a renewal applicant on its own, without the submission of a petition to deny, or a competing application?

A: As we indicated above, because of extended license terms, only 421 television renewal applications have been filed in the relevant time period. Nevertheless, the Commission has investigated renewal applicants on its own during this period. For example, the compliance of licensees with the equal employment opportunity rules and policies has been the subject of a number of inquiries by the Commission on its own motion. These have resulted in station sanctions ranging from letters of admonition to the imposition of requirements that periodic reports be filed as to minority and female employment progress. Since 1980, 113 stations have been sanctioned with reporting conditions, with 10 of the stations also receiving short-term renewals.

Further, although the question is framed in terms of investigation at renewal time, it is important to note that the Commission does receive information during station license terms that sometimes results in an investigation. In addition, the Commission has initiated investigations on its own when questions relating to licensee compliance with Commission rules has arisen in the context of assignment and transfer applications. These investigations have included inquiries into alleged unauthorized transfers of control and operations of broadcast facilities by aliens.

Trafficking

Q[1]: A recent issue of RTNDA Communicator reported that news staffs are being cut at many major market radio and independent TV stations and that broadcast editorials are on the decline. Those reports appear to contradict your contention in your testimony before the House Telecommunications Subcommittee that there is no hard evidence of a decline in news and public affairs?

A: There is little doubt that individual broadcasters are readjusting their approaches to news, public affairs and editorial staffing and programming as they respond to market forces and the regulatory freedom accorded them by the Commission's radio and television deregulation orders. I note preliminarily that realignments in staffing by broadcasters does not necessarily have any effect on the amount of news and public affairs programming produced. While certain of the networks have recently engaged in highly publicized staff reductions, the amount of programming produced by the network news divisions has nearly doubled in the past ten years.

Based on the RTNDA Communicator studies to which you refer, however, it appears that recent changes in news and public affairs staffing in the television service are best characterized as realignments of staffing among existing stations rather than net reductions in staffing. For example, according to the article by Dr. Vernon Stone in the April 1987 issue RTNDA Communicator, news staffs at independent television stations have declined during the period 1985-1986, but news staffs "continued to grow at network affiliates." And, according to the article, "[d]espite cuts by independent stations, the total TV news work force increased. . . ." Moreover -- and this is particularly important in evaluating any alleged adverse effect from these changes -- in small television markets, where viewers have fewer information sources from which to choose, TV news staffs either remained the same (ADI markets 101-150) or increased in size (ADI markets 151-214). Further, even if staffing were able to be equated with programming, any "decline" in news programming at independent stations may be attributed to the explosive growth in the number of such stations since 1980. During recent years, the number of independent stations has more than doubled, from 113 stations in 1980 to 283 stations in 1986. As a practical matter, during the first few years of operation these stations are not able to expend the resources to support much news programming. As a result, news programming statistics may be inadvertently skewed to reflect a decrease in such programming when that is not the case.

In radio, the RTNDA article indicates a net reduction in news staffs only for stations in major markets (those with populations of more than one million), where the median staff fell from 2.7 in 1985 to 1.4 in 1986. It is in these markets, however, that the total number of broadcast voices available is the highest; our recent Notice of Proposed Rulemaking concerning the broadcast multiple ownership rules, for example, found an average of 30.16 radio stations and 6.84 television stations in the top fifty markets. Given the multiplicity of broadcast sources in these markets, the potential for

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any adverse effect on the availability of information programming from such market-based adjustments in news staff commitments as reflected in the RTNDA survey is considerably reduced, if not eliminated. The benefits, however, of continuing to permit radio stations in such highly competitive markets to individually tailor their resource expenditures to marketplace demands and thereby to serve their communities more efficiently remain substantial. In all radio markets other than the major markets, the RTNDA survey reveals no appreciable change in news staff commitments.

With respect to broadcast editorializing, the article by G. Donald Gale in the May 1987 issue of the RTNDA Communicator indicates that there has been a decline both in the number of stations presenting editorial programming and in the number of editorials presented by those stations continuing to air such material. The author concludes, however, that these reductions have resulted from shortsighted cost cutting by some stations and not because of broadcast deregulation efforts by the Commission or from any lack of a needed regulatory incentive. Indeed, Mr. Gale indicates that editorial programming is a natural adjunct of news programming that creates credibility for the station and makes long term economic sense. As stations come to realize this, Mr. Gale believes, "editorials and commentary will continue to play an important role in the broadcast business. . . ." In any event, the Commission has never required licensees to editorialize.

In sum, I continue to believe that there is no "hard evidence" to suggest a palpable decline in news and public affairs programming in the wake of the Commission's radio and television deregulation actions.

Q[2]: Since the Commission has eliminated many of its record keeping requirements, is there any way to gather what you refer to in your testimony as "hard evidence?"

A: There are numerous means by which specific information and data concerning the programming activities of broadcast licensees could be gathered nothwithstanding the Commission's action deleting the program logging requirements for commercial and noncommercial radio and television stations. First, of course, the issues-programs lists still required to be maintained by licensees would afford substantial information concerning the most significant issue-oriented programming efforts of broadcasters. Beyond this continuing source of data, routine commercial program listings -- such as those found in daily newspapers or in such specialized publications as TV Guide -- regularly provide detailed program information. Moreover, as we noted in the television deregulation order, should there be a legitimate reason to do so, the Commission can document broadcasters' programming activities by any of several means, including special studies and investigations. The threshold question, however, is whether such recordkeeping burdens are warranted on a continuing basis; I do not believe they are.

Q[3]: In an effort to demonstrate that there has been an increase in news and public affairs, you rely on data concerning one network and three cable services. However, cable is still not available in many parts of the country, including most of the Nation's Capitol. Has the Commission uncovered any evidence that news and public affairs programming has declined in any markets? Has the Commission attempted to gather any information of the availability of news and informational programming?

A: As discussed above in response to question [1], available information suggests that individual broadcasters are adjusting their approaches to news and public affairs staffing and programming in response to market forces and the discretion the Commission's deregulation orders have afforded them. The same studies upon which this conclusion is based, however, also indicate that there has been no broad decline in the overall availability to broadcast audiences of news and public affairs programs. RTNDA Communicator, April 1987. The Commission is not aware of any evidence that news and public affairs programming has declined in any particular broadcast market or markets, nor has it specifically undertaken to gather data concerning the availability of news and public affairs programs. In fact, a recent survey conducted by the Television Information Office based on A.C. Neilson statistics discloses that local programming has increased. The survey considered the local news broadcast by each of the television network affiliates during the period from May 1986 to May 1987. The survey found that 37 stations added one-half to one hour of local news during the 4 p.m. to 7 p.m. time slot. Of these stations, 4 were new on the air and 11 had recently changed ownership. A total of 18 stations dropped one-half hour of local news. Of these stations, only 2 were the subject of recent ownership changes.

As we noted in adopting the television deregulation order, "[i]f at some time. . . there is significant market failure with respect to such programming, we are certain this will be brought to our attention by such means as audience complaints." [TVDereg at para. 74.] We have received no such complaints, and given that current studies suggest no appreciable decrease in news and public affairs programming, there appears little reason to burden licensees and the Commission with the recordkeeping and reporting obligations that would accompany any specialized program data-gathering effort by the FCC.

Q[4]: In your testimony before the House Subcommittee you stated that reinstatement of the trafficking rule could require owners to hold on to failing stations and that it could reduce the availability of stations to minority owners. S. 1277 provides an exemption for stations in economic distress and sales to minorities. Thus, it appears that those concerns are moot, doesn't it?

A: I believe that the reimposition of the three-year rule would adversely impact minorities and women, by creating a barrier to entry for such groups in several respects. Even if minorities (and women) were exempt from operation of the rule, such a rule would reduce the number of broadcast properties

available for purchase by prospective high risk or inexperienced buyers, a group that often includes women and minorities. By reducing the supply of broadcast properties on the market, such a rule could in the short term, actually increase station prices thereby making it more difficult for underrepresented groups (including women and minorities) to become part of the industry's ownership structure. For many of the same reasons, the rule obviously would make it more difficult for existing female and minority station owners to trade up to larger and more expensive broadcast properties.

Q[5]: In your testimony before the House, you also indicated that the number of stations sold that were held less than three years is misleading because in some cases individual stations are spun off from the group of stations acquired shortly after the group is acquired. In one case, you noted that a station was only held for one day. Isn't it true that these spinoffs are designed to raise additional funding to finance the purchase of the group of stations?

A: During my testimony, I said that several of the sales reflected in the statistics were spinoffs from group transfers. In one case, I noted that the station was bought and sold on the same day. I stated that it did not make sense to consider these as two separate transactions since what really happened was a single transfer that was made in two steps. Likewise, I recognized that those sales made pursuant to court order, as part of a bankruptcy proceeding or on behalf of an estate, cannot be construed as undesirable, even if less than three years has elapsed since the previous sale. While it is possible that the short term resales of one or more of a group of stations purchased together could reflect an asset liquidation intended to assist in financing the group purchase, our experience indicates that such sales are often motivated by quite different considerations. For example, the transfer after one day that was referenced in my testimony resulted from a "pass through" transaction. Apparently for tax reasons, the stock of the station concerned was transferred by the trust holding the shares to the trust's beneficiaries who, the next day, transferred the stock to the ultimate purchaser. Thus, the station quickly passed from the seller to the "true" buyer for all purposes other than "paper" tax considerations. Other short term transfer cases have resulted from the need to liquidate and distribute estate assets or to divest certain stations in order to comply with the Commission's multiple ownership restrictions. Short term resales could also reflect an attempt by the purchaser to realign its broadcast properties to more closely fit its media objectives. The purchaser might wish, for instance, to consolidate it holdings geographically, to diversify or harmonize the characteristics of its stations or to concentrate its resources on a fewer number of stations. In any event, even if a group station purchaser were to "spin off" a station for financing purposes, there is no reason to assume such action is contrary to the public interest.

Q[6]: Accompanying the increase in station sales and the rise in station prices, the level of debt incurred by purchasers has also increased significantly. Has the Commission considered the impact of the increasing debt levels on station operations?

A: While the question of debt loading and its impact on station operations has been raised in the context of various Commission actions, nothing of which we are aware suggests a need to accord this issue special regulatory consideration. Broadcasters, whether incoming purchasers or existing management, have every incentive not to structure their debt in such a manner or to incur obligations to such a degree as to jeopardize the value of their companies. That value is based on a broadcast station's capacity to generate revenues, both in terms of short-term income and long-term capital gains, which in turn depends on the ability of the station to attract substantial audiences. Attracting audiences, of course, requires competitive programming and a good technical delivery mechanism -- both of which necessitate adequate investment by the broadcaster. Incurring debt that precludes such investment is simply counterproductive, and there is no reason to presume that broadcasters would consciously do so. Moreover, the complex judgments involved in determining when a broadcaster's debt level might threaten its investment in this manner are, we submit, better made by the corporate officials and tested by the marketplace, than by government oversight and control.

Q[7]: When the Commission expanded its rules to allow station owners to hold 12 AM, 12 FM and 12 TV stations, the FCC indicated that it would rely more on the local ownership restrictions to ensure diversity. Have there been any changes in the broadcast marketplace to indicate that the local ownership rules are less important today?

A: In relaxing its national multiple ownership rules in 1984, the Commission did observe that:

> the most important idea markets are local. . . [N]ational broadcast ownership limits, as opposed to local ownership limits, ordinarily are not pertinent to assuring a diversity of views to the constituent elements of the American public.

Memorandum Opinion and Order in Gen. Docket No. 83-1009 at para. 18, citing Report and Order in Gen. Docket No. 83-1009 at para. 60 (footnote omitted). I believe that diversity, i.e., the availability of diverse news sources to any individual, is the most significant area for Commission focus. To foster this goal it is reasonable from time to time to consider the issue of whether the existing local rules are properly constructed and effective to achieve that goal, given the state of existing broadcast and information service markets and the relative benefits, efficiencies and costs attendant to various levels of local ownership restriction. Indeed, many of these issues are before the Commission in a pending proceeding. See Notice of Proposed Rule Making in MM

Docket No. 87-7 (Amendment of Section 73.5555 of the Commission's Rules, the Broadcast Multiple Ownership Rules).

Tax Certificates

Q[1]: As you know this past Sunday there was an article in the Washington Post on the sale of WTVT to a corporation, which is said to be controlled by a minority. The seller of the station was awarded a tax certificate, pursuant to the Commission's policy. Prior to approving this transaction, did the Commission examine the financial qualifications of the proposed buyer to determine whether the minority partner was, in fact, contributing 20 percent of the equity pursuant to the FCC's requirements?

A: On April 23, 1987, the Mass Media Bureau, acting pursuant to delegated authority, approved the assignment of license of station WTVT (TV) Tampa, Florida, from Gaylord Broadcasting Company to WTVT Holdings, Inc. Prior to approving the assignment, the application was reviewed to determine whether financial certification was provided consistent with Commission requirements. Such certification was provided in the application and was found by staff to be fully acceptable. In accordance with Commission policy concerning financial qualifications of transfer applicants, no further examination in this area was necessary. See answer to question number 3, below.

On April 27, 1987, Gaylord's request for a tax certificate was granted. The 20% equity requirement to which you refer is applicable, for tax certificate purposes, to limited partnerships only. See Minority Ownership In Broadcasting, 92 F.C.C. 2d 849 (1982). That requirement does not apply to corporate applicants, such as WTVT Holdings, Inc.

Because the assignee was a corporation, the tax certificate was approved under the Commission's 1978 standard. In its 1978 Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C. 2d 979 (1978), the Commission stated that it would use its authority under 26 U.S.C. Section 1071 to grant tax certificates to assignors or transferors where we found it appropriate to advance our policy of increasing minority ownership. At that time we envisioned issuing tax certificates where minority ownership was in excess of 50% or controlling. We also noted that whether certificates would be granted in other cases would depend on whether minority involvement was significant enough to justify the certificate in light of the purpose of the minority ownership policy.

Clarence V. McKee, who is Black, is the president and chief executive officer of WTVT Holdings, the transferee. He also owns 100% of the Class A common stock, 210 shares. As the sole Class A stockholder, Mr. McKee is entitled to four votes per share, a total of 840 votes (4x210). GNG-3, which is 100% owned by Gillett Group, Inc., owns 100% of the Class B common stock, 790 shares. As the sole Class B stockholder, Gillett is entitled to one vote per share, a total of 790 votes (1x790). Thus, McKee has 51.53% voting control of the licensee's 1000 shares of common stock. In addition, through

cumulative voting, McKee has the right to elect two of the licensee's three directors.

In summary, McKee: (1) controls the board of directors; (2) is president and chief executive officer of the licensee; and (3) has voting control of the licensee. Based on the above, staff determined that a tax certificate was warranted under the 1978 policy. Because no substantial or material questions of fact were raised as to the applicant's qualifications or as to the bona fides of Mr. McKee, no hearing was warranted.

Q[2]: If you did not require the parties to submit written evidence of their financial wherewithal to complete this transaction, on what basis did you determine that the proposal was not a sham?

A: As discussed above, staff determined that the request for a tax certificate was consistent with the 1978 policy. No objections were filed against the proposal and nothing on the face of the applications appeared to be inappropriate or raised a substantial and material question of fact. Further, in oral discussions with the assignee, it was represented that McKee would move from Washington, D.C. to Tampa, Florida and become directly involved on site, an eventuality which took place shortly after closing was completed.

While we did note that the parties contemplated that McKee could be bought out at the end of two years, we also noted that there were no Commission restrictions that would prohibit such an arrangement. The only condition subsequent to grant of a tax certificate is that the station must be held at least 1 year from the date of grant.

Q[3]: Does the Commission ever require parties to such a transaction to submit evidence of their financial qualifications to meet their contractual obligations?

A: Generally, no such evidence would be required unless there is a substantial and material question of fact as to the legitimacy of a certification. For example, if the Commission is presented with information which suggests that the assignee is in bankruptcy or is otherwise unable to meet its financial commitment, additional evidence would be requested. If such additional evidence failed to resolve the matter, a hearing would be held and the transfer ultimately could be denied.

Similarly, if a minority is required by the assignee to provide an equity contribution and the Commission has information which cannot be favorably resolved to indicate that the minority actually has the ability to meet his commitment, a tax certificate based on such contribution would be denied.

Q[4]: In connection with comparative hearing proceedings the FCC recently issued a statement informing applicants that they may be requested to demonstrate their financial qualifications. The purpose of this statement was

to forewarn applicants and to reduce the number of applicants who file applications without arranging financing to construct and operate their proposed stations. Has the Commission given any consideration to reinstating its requirement that applicants submit evidence of their financial qualifications at the time applications for new stations and approval to acquire existing stations?

A: After five years of permitting applicants for broadcast stations to certify that they are financially qualified in lieu of submitting detailed documentation of their financial qualifications, it appears that some applicants may be abusing this procedure by falsely certifying their qualifications. One means of deterring such abuses would be to return to the former requirement of having applicants submit detailed documentation of their financial qualifications. At this point, however, the Commission is attempting to curb abuses through a program of random verification of the financial certification of applicants, coupled with selective financial audits of those applicants with large numbers of applications pending. Under this program, each applicant selected is required to submit documentation supporting its certification that it has available the financial resources to construct and operate the broadcast station in question for three months without reliance on advertising revenues. We believe that this program of random and selective checks will preserve the benefits to applicants and the Commission of the simplified application requirements while providing a deterrent to false certifications. The Commission just instituted the verification program on March 19, 1987. If circumstances warrant in the future, we can consider other remedies - such as requiring some type of financial documentation for all applicants.

Children's Programming

Q[1]: In 1974 the Commission adopted a study on the impact of television on children. Since then has the Commission conducted any other studies concerning television and childern?

A: The Commission has demonstrated a continuing concern for children's television matters since its adoption of the 1974 Children's Television Report and Policy Statement and has taken a series of actions since that time based on this concern. In 1978, the Commission re-established the Children's Television Task Force to examine the effectiveness of the industry self-regulation approach to children's television issues taken in the 1974 Report and Policy Statement and to evaluate the impact of new technologies and alternative sources of programming on the availability of children's programming. The Commission received the Task Force's report in late 1979 and shortly thereafter, in response to the report's findings, issued a Notice of Proposed Rule Making that advanced various policy options ranging from eliminating broadcasters' specific obligation to serve the child audience to adopting mandatory programming rules or quantitative renewal processing guidelines for children's programming. Extensive comments, including

substantial studies, were filed by parties reflecting a broad diversity of opinion on the matters raised.

In 1983, in order to update the record, the Commission reopened the still pending children's television proceeding for supplemental comments. The Commission also held an en banc meeting to receive oral presentations on the issues raised in the Notice of Proposed Rule Making. On January 4, 1984, the Commission released its Report and Order in which it reviewed the extensive record then before it and concluded that specific, quantitative programming guidelines were not desirable. The Commission did restate, however, that "there is a continuing duty, under the public interest standard, on each licensee to examine the program needs of the child part of the audience and to be ready to demonstrate at renewal time its attention to those needs." Report and Order in Docket No. 19142 (1984) at para. 46. This decision was affirmed by the United States Court of Appeals for the District of Columbia Circuit.

Q[2]: Does the Commission require licensees to maintain any records on programming directed towards children?

A: Beyond the issues/programs lists required to be maintained by all broadcast licensees -- which would document significant programming directed to issues concerning children -- the Commission does not impose specific recordkeeping obligations on licensees with respect to children's programming. As noted in response to question [1] above, however, the Commission does expect each licensee to be "ready to demonstrate at renewal time its attention to [children's] needs." In connection with this obligation, licensees may maintain a variety of records that they consider valuable in documenting their efforts to meet the needs of their child audiences.

General

Q[1]: Has the Commission undertaken to examine the effects of the deregulation of the ownership and attribution rules and the renewal process, or the adoption of lotteries for LPTV and cellular licenses and the new policy statement in character?

A: Beyond the careful consideration and review of rulemaking actions as they are taken, the Commission has not conducted systematic reviews of the effects of the relaxation of its ownership rules and attribution standards in the context of its renewal process or of the impact of the adoption of lottery selection techniques in the LPTV and cellular radio services in relation to the Commission's revised policy statement on character.

Questions from July 17, 1987 hearing

Q[1]: S.1277 requires that the FCC audit 10 percent of television renewal applicants every year in order to ensure compliance with its record keeping requirements. Roughly, how many would this be?

A: The number of television stations that would be audited would range from zero in years that no television renewal applications are due to 48 in years when as many as one-third of television station licenses are up for renewal. The unevenness in the annual numbers is a consequence of the extension of license terms of television stations from 3 to 5 years in 1981.

Calendar Year	Projected TV Renewal Receipts	No. of Stations Audited
1988	450	45
1989	100	10
1990	0	0
1991	280	28
1992	480	48
1993	450	45
1994	100	10

Q[2]: Is there any way to estimate the number of employees or budget costs associated with the FCC's role in carrying out its auditing and other record related responsibilities in this bill? Can you put any dollar figure on the economic burden this record keeping will cause for broadcasters?

A: The budget costs that this legislation would impose on the Commission and the costs to broadcasters from the associated recordkeeping are both extremely difficult to calculate. Because the details of the renewal test and of the requirement that judgements as to "meritorious" programming be the cornerstone of renewal decisions remain to be worked out, there could be wide variances in estimates of both Commission and licensee workload associated with this effort. Further, assuming that those stations prima facie failing the test would be entitled to a hearing prior to issuance of a nonrenewal decision, estimates as to the number of hearings required would be dependent on the number of stations judged likely to fail the renewal test. Given the degree of uncertainty involved, it does not appear possible at this point to provide any reliable overall cost estimates. However, listed below are a number of the components from which estimates could be prepared.

- There are 1315 television stations and 10,128 radio stations currently authorized. Radio stations are licensed for seven years and television stations for five years. Thus, based on the present station universe, an average of 263 television stations and 1447 radio stations will file renewal applications each year. Because of the renewal cycles involved, actual annual receipts will vary between 120 and 3,400 applications.

- Regular processing would require approximately three to five workhours per application assuming the legislation permits some form of summary review process. Approximately 40 to 50 workhours would be required for the kind of detailed review associated with each audited application.

- For those applications designated for hearing, each hearing would require approximately 0.2 to 0.4 workyears of Commission staff resources.

- Approximately $28,000 would be required for additional computer hardware and software to maintain a readily accessible record of all enforcement and complaint activities pertaining to each station.

- The recordkeeping burden for each station would exceed the current average burden of 104 hours per year per station under the present issues/programs list requirement and could range as high as 2,190 hours per year for each television station and 4,380 hours per year for each radio station. The high end of this range assumes a recordkeeping burden equivalent to the old program logging rules. Dollar costs would vary from station to station and would depend on such things as the length of a station's programming day, the salary of the employee(s) assigned by the station to maintain the program records and whether the station has automatic program logging equipment.

The CHAIRMAN. Very good. We will hear then from Commissioner Quello. We will include, Commissioner, your statement in its entirety in the record, and you can highlight it or deliver it as you wish.

Mr. QUELLO. All right. I have a short version here of my statement Mr. Chairman, that I would like to give.

Mr. Chairman and members of the subcommittee, thank you for this opportunity to express my views on S. 1277 known as the Broadcast Improvements Act of 1987. I welcome the chance to engage in the constructive discussion on issues which are important to me and I think to this committee, and that is the reform of the comparative process, reinstituting the three-year holding rule, and elimination of the sunset provision from our newly adopted must-carry rules.

I am especially pleased to share this panel with my friend and colleague, Chairman Dennis Patrick. While we may have honest differences of opinion, Chairman Patrick has an open mind and has been willing to engage in constructive discussion of the issues.

During my time as an FCC commissioner, I have witnessed a productive evolution from over-regulation to deregulation, to unregulation, to marketplace self-regulation with occasional counterproductive lapses into unregulatory excess. I was glad to participate in the timely deregulatory transition that eliminated tons of paperwork and corrected over-intrusive government regulation. I am also gratified that I was around to register an occasional dissent when our actions struck me as counterproductive.

Some of the major issues where my viewpoints differ from the Commission majority may be relevant for discussion today, subjects like the repeal of the three-year anti-trafficking rule, sunsetting the FCC must-carry rules, minority preferences and the deemphasis on localism and the public trustee concepts.

Most of the time the differences are merely a matter of degree. Our occasional disagreements represent an honest difference in philosophical and regulatory approach. Conflicting viewpoints are a useful fact of life in Commission processes. They represent a commissioner's individual evaluation of a legal record and his personal perception of logic, reason and public interest.

At the outset, I believe the time has come to reaffirm the public interest standard for broadcasting. The legislation before you is a step in the right direction, striking a proper balance between public interest obligations and the need for broadcasters to compete in the marketplace.

Recently there has been much discussion about the need for renewal reform and the tradeoffs necessary to obtain such relief. I do not view the issue in this light. Since enactment of the Communications Act of 1934, the Congress, the Commission and the courts have all recognized the need for a renewal policy that would be fair to worthy incumbent licensees. Underlying this policy is the laudable goal of promoting stability, certainty of investment, long-term program planning, and avoiding restructuring of the industry on a case-by-case basis. Simply stated, creating a stable broadcast environment enhances service to the public.

The current comparative process detracts from these public interest objectives. The uncertainty and needless expense of the present regulatory requirements may serve to undercut service to the public by diverting scarce resources away from programming, especially public affairs. The two-step renewal process envisioned by Senate 1277 will help reduce the burdens and uncertainties surrounding the present system.

I would note, however, that great care should be taken in crafting the requirements necessary to pass muster under the first step, particulary with respect to defining the term "meritorious program service." To the extent the Senate feels the need to define "meritorious" in the legislation, then I believe it should track the programming obligations currently in effect by the Commission.

Our current program obligations were the result of decades of experience enforcing various types of content regulation. I believe our existing program requirements strike a proper balance between fostering public trustee obligations and providing the necessary flexibility for broadcasters to effectively compete in an increasingly competitive market with unregulated entities such as MDS, cable, satellite and VCRs.

The policies that underlie our renewal processes apply equally to the transfer process. Again, the Commission should foster policies that promote stability and avoid wide restructuring of the industry. Most importantly, the Commission should seek to structure an economic environment that facilitates service to the public. This can be accomplished by reinstituting the Commission's three-year holding rule in combination with the two-step renewal process.

The trend toward trafficking is beyond question. Data from several sources reveal a disturbing trend toward increased station flipping. For example, in 1983 only 5.1 percent of the television stations sold were held for less than three years. By 1985 the percentage increased to 31.5 percent. In 1986 an astounding 52 percent of the television stations sold were held less than three years.

It is worth noting that back in 1962, the Commission enacted its anti-trafficking rules to correct what it believed to be an undesirable trend toward accelerated station trafficking. For example, in 1961, 45 percent of the stations sold were held for less than three years. In 1960, 53 percent of the stations sold were held less than three years. So, with a 52.1 percent of the television stations sold being held less than three years in 1986, it seems like we have come full circle. It is time again for corrective action.

I believe the concerns that moved the Commission to act in 1962 apply equally today: rapid station transfers, hostile takeovers, and an environment favoring corporate raiders to distorts an otherwise stable, functioning broadcast marketplace. Speculators and traffickers have little interest in programming and little incentive to serve their communities. Reestablishing the three-year rule will help reemphasize the vital public interest standard in broadcasting.

In sum, a carefully crafted, two-step comparative process, combined with the three-year rule, will further strengthen the economic incentives for broadcasters who serve the public. Also, the current program issues requirement serves as a major incentive to meet community needs without significantly infringing on broadcasters' editorial discretion or First Amendment rights.

I recognize there are other important aspects of the bill now before you. For example, I fully support eliminating the sunset provision from the Commission's new must-carry rules. My complete thoughts are contained in the written statement which you were good enough to put in the record.

Thank you, Mr. Chairman.

[The statement and questions follow:]

STATEMENT OF JAMES H. QUELLO, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

In recent years the Commission has taken significant steps to deregulate broadcasting. On balance. I believe the Commission's actions have benefitted the American people. We have created a more competitive broadcast environment and increased the number of viewing options available to the listening and viewing public.

During my time as an FCC Commissioner, I have witnessed a productive evolution from overregulation to deregulation to unregulation to marketplace self regulations with occasional counterproductive lapses into unregulatory excess. I was glad to participate in the timely deregulatory transition that eliminated tons of paperwork and corrected over-intrusive government regulation. I'm also gratified that I was around to register an occasional dissent when our actions struck me as counterproductive.

Some of the major issues where my viewpoints differ from the Commission majority may be relevant for discussion today. Subjects like repeal of the three year anti-trafficking rule, sunsetting current FCC must carry rules, minority preferences, and the de-empasis on localism and public trustee concepts. Sometimes the differences are merely a matter of degree.

Our occasional disagreements represent an honest difference in philosophical and regulatory approach. Conflicting viewpoints are a well established and useful fact of life in Commission processes. They represent an individaul Commissioner's evaluation of a legal record and his personal perception of logic, reason and serving public interest.

At the outset, I believe the time has come to reaffirm the public interest standard for broadcasting. Fundamentally, and by Congressional statute, broadcasters are granted a license from the government to operate broadcast facilities in the public interest. They are public trustees and have a fiduciary obligation to their communities of license. Broadcasting is a unique and distinct industry. We are not dealing with toasters, pork bellies, or any other commodity. I believe we all can agree that broadcasters must remain accountable to the public interest standard which is enforced by the Commission and the Congress.

In crafting communications policy, however, it is important to remember that broadcasting is, and will always, remain, a business. The framers of the Communications Act created a unique system of broadcasting, encompassing both private sector efficiencies and public responsibilities. As your invitation stated, the key objective in crafting communications policy is to "create a proper balance between the public interest obligations of broadcasters and the broadcaster's interest to operate unfettered in the marketplace."

I believe the bill before you, as a general matter, is an appropriate step in attempting to strike this balance. The creation of a two step comparative renewal process is clearly a step in the right direction.

Before proceeding with the specifics of the bill, however, I believe it is important to establish some generalized conclusions at the outset. Current debate surrounding broadcast reform has been couched in terms of the industry "trading off" certain regulatory actions in order to obtain relief from the current comparative renewal process. While I believe it is important to reaffirm the public interest standard, we should aviod pushing the pendulum back to the point where we merely repeat history.

The broadcast marketplace does not resemble that which existed even five years ago. Today, broadcasters face ever increasing competition from now, essentially unregulated, technologies such as cable, MDS, video cassette recorders and direct satellite delivery. In addition there is greater competition among broadcasters themselves for the local advertising dollar. Because broadcasters are no longer the only "mass media voice in town," the Commission and the Congress should seek to promote flexibility in regulating the medium. Such flexibility will enhance the broadcaster's ability to compete with other nonregulated media. Most importantly, we should seek to create an economic environment which fosters service to the public. This goal can be best achieved by adopting a two step renewal process combined with a three-year holding rule. Together these proposals will provide stability and investment certainty in the industry. It will help facilitate long range program planning. Moreover, the proposal will eliminate speculative trafficking which undercuts the broadcasters natural economic incentive to serve its community.

The bill before you accomplishes this goal to a large extent. Upon close examination however, I would respectfully make a few suggestions to incorporate into the legislative history.

TITLE I. RENEWAL OF BROADCAST LICENSES

A. Background

Before we revise our current rules, it is important to examine the historical and policy background of the comparative renewal process. While broadcasters have no vested rights to the spectrum, the Congress, the Commission, and the Courts have long recognized the need for a renewal process that favors worthy incumbents.

For example, the Court of Appeals, as early as 1939, expressed a sentiment favoring existing licenses. *See e.g. Evangelical Lutheran Synod* v. *FCC,* 105 F.2d 793, 795 (D.C. Cir. 1939). Similarly, the Commission in *Hearst Radio, Inc. (WBAL),* 15 FCC 1149, 1175 (1951, recognized that an incumbent's record of service created a greater likelihood that such performance would be continued in the subsequent license term. Furthermore, a challenger might not be able to render its promised service when confronted with the reality, and responsibilities, of being the actual licensee.

In 1952, Congress adopted an amendment striking language from Section 307(d), that requires the Commission to evaluate renewal applicants under the same standards as new applicants. The House Report accompanying the 1952 legislation termed the approach formerly prescribed by the deleted language as "neither realistic not [reflective of] the way in which the Commission has actually handled renewal cases." *See* House Rept. No. 1750, 82nd Cong. 2d Sess. (April 8, 1952). The Senate added that the Commission had the "right and duty" to consider the performance of a renewal applicant "against the broad standard of the public interest, convenience and necessity." *See* Senate Rept. No. 44, 82nd Cong. 2d Sess. (Jan. 25, 1951).

In 1969, the Commission, denied the renewal application of WHDH-TV and awarded the license to a competing applicant. *See WHDH, Inc.,* 16 FCC 2d 1, 9 (1969), rehearing denied 17 FCC 2d 856 (1969) *Aff'd sub nom. Greater Boston Television Corp.* v. *FCC,* 444 F.2d 841, *pet. denied,* 463 F.2d 268 (D.C. Cir. 1971). The case sent shock waves through the industry. On appeal, the court expressed the view that the Commission ought to retain "the legitimate renewal expectancies implicit in the structure of the Act." "In the ordinary case," the Court noted, "such expectancies are provided in order to promote security of tenure and to induce efforts and

investments, furthering the public interest, that may not be devoted, by a license without reasonable security." *Id.*

In 1970, the Commission attempted to reconcile the conflicting aspects of its regulatory scheme in comparative renewal cases, by adopting a *Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants*, 22 FCC 2d 424 (1970). The policy was similar to that envisioned by the current legislative proposal, establishing a two step renewal process. According to the policy statement, if a licensee's record of service to the public was substantial, without serious deficiencies, the proceeding would terminate at that point and competing applicants would not be considered.

Unfortunately, the United States Court of Appeals for the District of Columbia Circuit in *Citizens Communications Center* v. *FCC*, struck down the Commission's 1970 *Policy Statement*. The court held that the bifurcated hearing procedure adopted by the Commission, contravened Section 309 of the Communications Act, as interpreted by the Supreme Court in *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945), by depriving qualified challenging applications. The Court's holding was based primarily on the fact that the Commission had denied competing applicants a procedural right, namely, a full comparative hearing. However, the Court did not preclude the possibility that a finding on the renewal applicant's past record might prove to be determinative after an appropriate comparative evaluation and notwithstanding the other comparative criteria.

In the wake of *Citizens*, The Commission proceeded with efforts to provide quantitative standards for judging the performance of renewal applicants. By *Notice of Inquiry*, 27 FCC 2d 580 (1971), the Commission instituted a proceeding to explore whether, at least for some purposes, it should attempt to quantify the concept of substantial service. *See also Further Notice of Inquiry*, 31 FCC 2d 443 (1971); *Second Further Notice of Inquiry*, 43 FCC 2d 367 (1973); *Third Further Notice of Inquiry*, 43 FCC 1043 (1973). The Commission issued its *Report and Order* in 1977, and declined to adopt quantitative program standards for television broadcasters involved in comparative renewal proceedings. *Formulation of Policies Relating to the Broadcasting Renewal Applicant Stemming From the Comparative Hearing Process*, 66 FCC 2d 419 (1977), *affirmed sub nom. National Black Media Coalition* v. *FCC*, 589 F.2d 578 (D.C. Cir. 1978).[1]

The most recent formulation of the Commission's renewal policy was expressed in *Central Florida Enterprises* v. *FCC*, 683 F.2d 503 (D.C. Cir. 1982). In this seminal decision, the United States Circuit Court of Appeals for the District of Columbia affirmed the Commission's current approach stating:

"We believe that the formulation by the FCC in its latest decision, however, is a permissible way to incorporate some renewal expectancy while still undertaking the required comparative hearing. *The new policy, as we understand it is simply this: renewal expectancy is to be a factor weighed with all the other factors, and the better the past record, the greater the renewal expectancy weight.*" [italics added] *Id.*

Pursuant to this approach, the Commission first examines a broadcaster's past record of performance. A renewal expectancy is granted to the incumbent depending on the Commission's review of the incumbent's program performance. If the Commission determines that the licensee's level of performace has been meritorious *i.e.*, above minimum), then the renewal expectancy is granted. The licensee is then evaluated against the new challenging applicant according to the structural factors found in the 1965 *Comparative Policy Statement e.g.*, diversity and integration of ownership into management). Alternatively, if the level of performance has been considered minimal, little or no weight will be given to the expectany in the comparative analysis.

Recently, the Court of Appeals in *Victor Broadcasting Inc.* v. *FCC*, 722 F.2d 756 (D.C. Cir. 1983), affirmed the Commission's formulation of the new renewal policy adopted in *Central Florida*. Most importantly, however, the court reaffirmed the three part policy justification underlying the renewal expectancies. Those three justifications are: (1) "there is no guarantee that a challenger's paper proposals will, in fact, match the incumbent's proven performance;" (2) the likelihood of renewal encourages licensees to make investments to ensure quality service which would not be made if their dedication to service is not "rewarded;" and (30 the comparing of challengers and incumbents on the same basis as new applicants are compared

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[1] At approximately the same time, the United States Supreme Court in *NCCB* v. *FCC*, 436 U.S. 775 (1978), observed that the legitimate renewal expectancy afforded a licensee who has given, in the Court's words, "meritorious" service is consistent with the Communications Act. *Id.* at 805.

could lead to an undesirable wholesale restructuring of the brodcast industry. *Id.* at 762.

The current debate over renewal reform has been cast in terms of "giving" something to broadcasters in return for more regulation. As the above analysis demonstrates, there are sound public policy reasons for renewal reform. The most important of which is the need for stability and long range program planning. The problems with the current renewal process become particularly acute as broadcasting faces over increasing competition from essentially unregulated communications services such as cable-TV, MDS and direct satellite television. If broadcasting is to compete effectively, we must look towards a more flexible and less burdensome regulatory regime. It is not a question of trading off regulatory burdens. The issue should be devising a comparative renewal process that promotes the public interest.

B. Revision of the present system

While the present renewal system tries to incorporate these three policy considerations into the renewal process, the current comparative renewal process does not serve the public interest. Under the present regulatory regime, licensees that have served their communities still face the risk of protracted and expensive litigation.[2] Such a policy undermines stability in broadcaster to incur needless expenses.

By proposing a two step renewal process, the legislation rectifies the problem associated with costs of protracted litigation. Such a policy advances the objectives underlying the concept of a renewal expectancy. Care should be taken, however, in crafting the "meritorious" test for the first step in the process. It would be counterproductive to adopt a two step process if the first step is so uncertain or difficult as to conflict with the underlying policy objectives inherent in the renewal process. Accordingly, in crafting obligations for renewal, the Subcommittee should keep in mind the three policy objectives underlying the renewal process: (1) incumbent's proven past performance offers a better guarantee than a challenger's paper proposals; (2) renewal encourages licensees to make investments to ensure quality service; and, (3) avoiding wholesale restructuring of the industry through the renewal process.

The legislative proposal before the Subcommittee would require licensees to provide "meritorious" program service in order to pass muster under the first step. There are several important questions, however, that I would like to see addressed in the legislative history.

A fundamental concern is whether a licensee that does not pass muster under the first step can refile and participate as a new applicant in the second phase of the hearing? If not, then the standard established in the proposed statute becomes, in effect, a basic qualifying programming obligation and not merely a test for the privilege of avoiding a comparative hearing. A related question involves whether the standard established by the legislation applies to *all* applications for renewal, including uncontested renewals. The express language of the bill would appear to apply the new standard to all renewal applications both contested and uncontested.

Assuming the Senate contemplates defining the term "meritorious" in the legislative history, as opposed to delegating that responsibility to the Commission, then the statute must define the term with precision. The Commission has examined the question of the level of satisfactory service for over a decade and has come up with numerous definitions. For example, we have employed terms such as superior, substantial and above "minimum." In addition, does the proposed statute envision defining meritorious service in qualitative or quantitative terms? As for a purely quantitiative approach, the Commission examined this issue in 1978 and rejected the proposal. *See National Black Media Coalition* v. *FCC*, 589 F.2d 578 (D.C. Cir. 1978). Moreover, there are obvious problems with allowing a government agency to make decisions on elements such as quality, which are subjective in nature. This problem may be exacerbated by the fact that the statute envisions examining a licensee's programming as a whole, which appears to include entertainment programming. Finally, the legislation expands a broadcaster's primary responsibilities from its local community of license to its "service area." Such a policy may ultimately detract from a licensee's obligation to serve its community of license, thereby undercutting the Congressional policy of promoting localism pursuant to Section 307(b) of the Act.

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[2] While data on this subject are far from complete, there is evidence demonstrating that inordiante expenditures are required to obtain renewal. *See e.g.*, Wirth, Michael, Harry Bloch and Lawrence Thompson *Television & Radio Station Expenditure Behavior under the Uncertainty of License Renewal*, April 1982, included in Comments of the National Association of Broadcasters in MM Docket No. 83-670.

The definition of meritorious service is a critical element if the legislation is to promote stability in the industry and stimulate greater program service to the public. I believe a licensee that has fulfilled its public interest responsibilities and complied with our rules and policies should be renewed. The key issue, of course, is to determine what level of performance is consistent with the public interest mandate. I believe the programming obligations currently required by the Commission, define and appropriate measure of service to the public sufficient to warrant renewal. These obligations were the result of extensive economic analysis concerning the marketplace incentives for the provision of issue responsive programming. *See Deregulation of Radio,* 84 FCC 2d 968 (1981), *aff'd sub nom., UCC* v. *FCC,* 707 F.2d 1413(D.C. Cir. 1983); *Deregulation of Television,* 98 FCC 2d 1076 (1984). In addition, broadcasters remain obligated to present children's programming. *See Children's Television,* 96 FCC 2d 634 (1984) *aff'd sub nom., Action for Children's Television* v. *FCC,* 756, F.2d 899 (1985).

These policies were derived after a careful balancing of public interest concerns, economic incentives for the provision of such programming and the First Amendment values involved. The programming obligations established by these rules represents a firm commitment on the part of broadcasters to serve their communities and children. It is an obligation that the Commission can and will enforce.[3]

As a practical matter, broadcasters under stable market conditions have strong economic incentives to serve their communities. For those broadcasters that plan to operate for an appreciable length of time, serving the community is essential for economic survival. Accordingly, I believe it is incumbent upon the Commission and the Congress to examine the broadcast marketplace and to adopt policies to ensure that the economic incentives to meet the public interest remain.[4] Rigid, inflexible programming obligations do not provide broadcasters with the requisite flexibility to serve their communities in a rapidly changing economic environment. Communications regulation should create a structure that will allow creativity in serving the public.

Viewed in this light, I would like to focus attention on Title II of S.1277 which seeks to reestablish the three-year rule. I believe reinstituting the anti-trafficking rules will restore the correct incentives for broadcasters to serve their communities. The policies that underlie our comparative renewal process apply equally to the three-year holding rule. Renewal reform will help promote stability and long-range planning in broadcasting. Reimposing the three-year rule will also promote stability and long-range program planning in the industry. As with renewal reform, the three-year rule will prevent possible adverse restructuring of the industry on a case-by-case basis. Therefore, the two policies are linked and should be included as one legislative package.

TITLE II. BROADCAST OWNERSHIP STABILITY

My views on reestablishing the Commission's anti-trafficking rules are well known. I fully support reinstituting the three-year holding rule for broadcast licensees. Eliminating speculative trafficking in broadcasting would help reestablish the public interest standard by recreating the economic incentives for broadcasters to serve their communities.

I have previously submitted two lengthy statements to the House Subcommittee on Telecommunications supporting reestablishment of the three-year rule.

Without question there has been unprecedented churn in broadcasting in recent years. For example, data provided by Paul Kagan Associates, Inc. show that in 1986, 160 television stations were sold. Twenty three percent of those stations were held two years or less.

Transfers in radio have been similarly brisk. Data compiled by Com Capital Group of New York demonstrate that approximately 1600 radio stations were sold

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[3] At this point in time, I do not see the need for a return to the random audit procedures for television contemplated by S.1277. Our current short form procedures rest on the presumption of service to the public. This presumption may be rebutted by petitions to deny or complaints alleging programming violations, *See Deregulation of Commercial Television,* 98 FCC 2d 1076, 1112 (1984). The complaint process has been recognized as a sufficient monitoring mechanism. *See Action for Children's Television* v. *FCC,* No 86-1425, slip op. at 17-18 (D.C. Cir. June 26, 1987); *Black Citizens for Fair Media* v. *FCC.* 719 F.2d 407 (D.C. Cir (1983), *Cert. denied,* (No. 83-1498, June 18, 1984). Reinstitution of long form audit procedures would appear to be unnecessary.

[4] In this regard, I fully support the limitations on financial settlements contained in the proposed legislation. Financial settlements in this context merely divert resources and do not necessarily improve service to the public.

in 1985 and 1986. Other data, based on a more limited sample of radio sales, provided by Com Capital Groups, suggests the approximately 29 percent of the radio stations that were resold for a "significant" capital gain in 1985 and 1986, had been owned for less than three years.

Data compiled by the Mass Media Bureau, also demonstrate an unequivocal trend towards increased station trafficking. The most telling evidence is Mass Media Bureau's analysis of statistics from the 1987 Edition of the *Television Factbook*. In 1983, only 5.1 percent of the television stations sold were held less than three years. The number of television stations sold that were held less than three years increased to 28.4 percent of station sales in 1984 and 31.6 percent in 1985. According to the latest available data, and astounding 52 percent of the television stations sold in 1986 were owned less than three years.

It is important to remember that the Commission, in 1962, first adopted the three-year rule in response to what it believed to be a trend toward accelerated station trading. At that time, 1961, 45 percent of all station transfers involved stations that were held less than 3 years. In 1960, 53 percent of the stations traded were held less than 3 years. With 52 percent of all stations traded being held less than 3 years in 1986, it appears we have come full circle.

I believe concerns that prompted Commission action in 1962 are equally applicable to today's marketplace. There is every reason to believe the trend will continue. For example, it has been estimated that 1987 will rank as the third biggest year for station sales, a volume of approximately 4 billion dollars. *See Television/Radio Age*, June 22, 1987, p. 46. Furthermore, the above data demonstrate that trading in stations has become a widely accepted business strategy.

I believe that continued trafficking in broadcast properties is inconsistent with the public interest.[5] Those opposing the three-year rule generally argue that speculators in broadcast properties have an economic incentive to operate the stations efficiently and in the public interest. As I have stated previously, rapid speculative turnovers in broadcasting provide economic disincentives to serve the public interest. Servicing heavy debt burdens and short-run financial objectives impede the provision of issue responsive programming. Moreover, testimony provided by David Shutz of Com Capital Group before the House Subcommittee on Telecommunications and Finance states that it takes approximately 18 to 24 months for the effects of expense slashing and personnel cutbacks—which increase cash flow, hence profitability, in the short term—to produce tangible declines in audience. As a result, the speculator is able to artifically inflate the price of a station—price being a multiple of the station's cash flow—and sell it before any adverse effects surface.

Supporters of current policies argue that there is no demonstrable harm to station trafficking. It should be noted, however, that the Commission's analysis of marketplace performance was conducted at a time when short-term station trading was not a commonplace event in broadcasting. At that time broadcasters had only one investment option, to serve the community on a long-term basis. As noted in my prior statements, licensees now have an equally profitable business strategy—"station selling." Because we are ultimately concerned with the public interest, the burden of proving that there is no harm in the *current* marketplace environment should be placed on those promoting these policies.

A second issue that has surfaced is whether the Commission will be able to monitor speculative trafficking absent a three-year rule. Obviously, the Commission has the obligation to approve all transfers under section 310(d) of the Act. However, the language of the *Report and Order* eliminating the three-year rule leaves little room for review of speculative trafficking under existing precedent. *See* Report and Order in BC docket No. 81-897, 52 RR 2d 1081, 1088 (1982). Without a reasoned statement that the Commission has decided to change its policy, there is no current legal theory to evaluate speculators, save for a finding of misrepresentation or possibly an abuse of process. In any event, the Commission would have to announce that it was changing its policy, either by rule making or in the context of a specific case, in order to prevent speculative transfers.

As noted in my previous testimony, I don't oppose all mergers and sales. Some of the acquisitions and mergers between communications companies serve the public interest. My main concern is with professional raiders and speculators with little or no broadcast or communications background or public interest commitment. I have been quoted and remain convinced that "I don't think I was appointed by the Presi-

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[5] A more detailed explanation of my conclusions appears in my prior testimony. *See* Appendix A.

dent and confirmed by Congress to accommodate a bunch of fast buck artists trading broadcast properties like commodities."

While elimination of the three-year rule was not the sole cause of the merger mania that has gripped the industry, reinstatement of three-year will help prevent speculative station trafficking. As a result of the rule, business entities seeking to acquire control of broadcasting facilities will do so with the knowledge that they must hold the license for at least three years. Because of this possibility, those seeking short-term quick profits from the resale of broadcast facilities will be deterred. With a three-year rule, broadcasters will be able to devote more resources to programming and meeting the needs of their communities instead of concentrating on fighting takeovers and heavy debt burdens.

C. Summary

An appropriate regulatory focus would be to develop a system ensuring that broadcast licensees will fulfill their responsibilities as public trustees. I believe that the adoption of the two step renewal process would remedy unnecessary costs associated with the current comparative process. However, in order to ensure that economic incentives to serve the public remain, I would reinstitute the three-year holding rule to prevent "fast-buck speculators" from distorting the otherwise functioning economic incentives in the broadcast industry. Together, these revisions strike an appropriate balance between the public interest and economic freedom.

Apart from the issues of comparative renewal and station trafficking, there are other aspects of the bill that warrant discussion. As a general matter, I can support many of these provisions.

TITLE III. MANDATORY CARRIAGE OF BROADCAST SIGNALS

I fully support Title III of the bill which would remove the sunset provision contained in the Commission's must carry rule. As you know, I was against sunsetting the rules before the Commission had an opportunity to determine the effects of its decision. *See Report and Order* in MM Docket No. 85-349, 1 FCC Rcd. 864, 912 (Quello, concurring)..

The Commission's decision to sunset was based on a belief that merely educating the American public about the need for an antenna and an A/B switch was sufficient to meet its responsibilities under Section 307(b) fo the Act. I do not find this line of reasoning persuasive. The mere existence of an A/B switch does not address the question of whether the switch is an effective competitive alternative to cable television. The efficacy of the A/B switch alternative should be a crucial aspect of our public interest analysis. Such an examination would appear to be required by our duty to allocate television stations to each community under Section 307(b) of the Act.

Cable television competes directly with local broadcasting. For example, a report released recently by a New York advertising agency concludes that cable may be a better medium for advertisers than broadcasting. *See, e.g., Communications Daily,* July 10, 1987, pp. 1, 3. As a result, there is a clear incentive to drop local television signals or threaten to drop stations in an attempt to extract compensation for carriage. Evidence of stations being dropped is not hard to find. The record before the Commission contained numerous examples of independent commercial stations being dropped by cable operators in the absence of a must-carry rule. Moreover, apart form commercial competition, noncommercial stations appear to be at risk. Recent data provided by the National Association of Public Television Stations estimate that between 168 and 184 public stations have been deleted from various cable systems.

Competition between cable television and local television broadcasting for local advertising dollars is incresing and will increase in the future, providing further incentive to drop local signals. Sound policymaking dictates that the Commission should examine that impact of its new must-carry rules before eliminating them. In other contexts, the Commission has expressed concern over the need for a level playing field. In this case, we should make sure the field is level before taking ourselves out of the game.

Therefore, I fully support this provision of S. 1277. I would add, however, that the legislative history of this provision should make reference to section 307(b) of the Communications Act. Localism is an appropriate legal justification for signal carriage obligations and has been recognized by the Courts. *See e.g. Capital Cities Cable, Inc.* v. *Crisp,* 104 S.Ct. 2694, 2708 (1984). Unfortunately, the Commission chose to de-emphasize this important policy objective when adopting the new must carry

rules. Congress shcould include this important statutory obligation in the legislative history when enacting this part of S. 1277.

TITLE IV. DIVERSIFICATION IN OWNERSHIP OF BROADCAST STATIONS

A. Minority ownership

This provision of the bill codifies the Commission's existing policies regarding comparative preferences, distress sales and tax certificates. The Commission currently has before it a *Notice of Inquiry* examining these policies. *See Reexamination of Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies,* 52 Fed. Reg. 596 (Jan. 7, 1987). In this proceeding, the Commission is examining whether there is a nexus between minority ownership and minority programming.

I have stated on numerous occasions that these minority ownership policies have served the public interest. In my mind those seeking to eliminate these policies bear a heavy burden to demonstrate that these procedures are inconsistent with the public interest.

I understand the desire to incorporate our minority ownership policies into the statute. However, codification may, in some instances, hinder the commission's ability to modify its policies that will help minorities. For example, the Commission also has an outstanding *Notice of Inquiry* that seeks comment on a modification of the distress sale policy that would benefit minority owners. *See Notice of Inquiry* in MM Docket No. 85–299, FCC 85–543, 50 Fed. Reg. 42047 (October 17, 1985), (released Oct. 8, 1985). The *Notice* proposes to allow distress sale licensees to sell to minority controlled entities after the licensee has been designated for a hearing, for 50% of the fair market value. This modification would be precluded by the language of the proposed statute which appears to only allow distress sales prior to designation. Accordingly, the ability to remain flexible is a factor that the Senate should consider in deliberating this bill.

B. Multiple ownership of broadcast stations

The bill appears to "freeze" the Commission's multiple ownership rules as they exist today. Of course, diversity of ownership is one of the cornerstones of communications policy. It is a policy I have always supported and will continue to do so. The need for diverse, antagonistic ownership of broadcast stations is especially important in local markets.

I am not persuaded, however, that we need to "freeze" our multiple ownership rules at their current levels. The broadcast market has undergone tremendous change in recent years. New competitors such as cable television, VCRs, and satellite-direct services are competing with traditional over-the-air television. I expect the economic environment will continue to undergo significant changes in the near future.

The Commission should retain the flexibility to adapt its multiple ownership rules to changing economic circumstances. For example, one of the primary reasons for increasing the national multiple ownership limits was to facilitate the possibility of developing new networking possibilities. We are just beginning to see the first attempts at creating a new broadcast programming service today. I believe the Commission—with its expertise in this area—may be in a better position to react quickly to marketplace changes. Provided there is oversight from Congress, crafting ownership rules should remain as a delegated function.

TITLE V. EXCHANGE OF BROADCAST STATIONS

Section 501 of the proposed legislation concerns the ability of a noncommercial UHF station to swap its facilities with a commercial UHF facility. Current Comission practice allows intra-band exchanges. For example a noncommercial UHF can swap its facilities with a commercial UHF station. The proposed statute would eliminate only interband swapping between UHF and VHF facilities.

At one time it was believed that noncommercial broadcasters would benefit from such interband exchanges. There are mixed views among the public television community regarding such interband swapping, then codifying this provision would not cause undue concern among noncommercial television broadcasters. Alternatively, because there is little demand for these changes, it may not be necessary to codify a proscription against such UHF/VHF exchanges. It is possible, of course, that there may be isolated and unique circumstances which might justify permitting a UHF/VHF swap.

CONCLUSION

In sum, the Senate should adopt the two-step renewal process envisioned by S. 1277. However, in crafting the renewal obligations, I believe the legislation should track the obligations currently imposed by the Commission's rules regarding issue responsive and children's programming. There is no need to impose more burdensome program requirements. Adopting more stringent rules would simply cancel out any benefits derived from the two-step renewal process. The current issue-responsive programming requirement serves as a major incentive to meet community needs without significantly impinging on a broadcaster's editorial discretion or First Amendment rights.

In return, the Senate should adopt Title II of the bill that reestablishes the three-year rule. Re-imposing the three-year rule will provide the necessary economic incentives for broadcasters to serve their communities and will, in itself, re-emphasize the public interest obligations of the broadcasters. By reinstituting our trafficking rules and revising our hostile takeover policies, broadcasters will be able to devote more resources to programming and meeting the needs of their communities instead of fighting takeovers or financing heavy debt burdens.

QUESTIONS OF SENATOR INOUYE AND THE ANSWERS

RENEWAL

Question. Commissioner Quello, it has been suggested that in order to eliminate uncertainty as to how much local programming licensees are required to broadcast, we should establish percentages of programming in one or more categories. Do you agree with that proposal?

Answer. I do not believe that percentage programming requirements serve the public interest. During the 1970s, the Commission adopted program percentage guidelines for processing and approving uncontested license renewals. *See Amendments to Delegations of Authority,* 43 FCC 2d 638 (1973); *Amendments to Delegations of Authority,* 59 FCC 2d 491 (1976). In 1981, we eliminated the percentage programming obligations for radio and in 1984 we eliminated the percentage programming requirements for television. *See Report and Order* in MM Docket No. 83-670, 98 FCC 2d 1076, 1091-92 (1984) *recon. denied,* 104 FCC 2d 358 (1986) *remanded on other grounds sub nom., Action for Children's Television* v. *FCC,* No. 86-1425 (D.C. Cir. June 26, 1987) ["*Television Deregulation*"]; *Report and Order* in BC Docket No. 79-219, 84 FCC 2d 968, 977 (1981), *recon. denied,* 87 FCC 2d 797 (1981), *rev'd on other grunds sub nom., Office of Communications of the United Church of Christ* v. *FCC,* 707 F.2d 1413 (D.C. Cir. 1983) ["*Radio Deregulation*"].

As the Commission has noted in these proceedings, our traditional policy objectives with respect to programming have never been fulfilled by presentation of mere quantities of specific programming. The Commission and the Courts have both recognized that quantity, in and of itself, is not necessarily an accurate measure of the overall responsiveness of a licensee's programming. Moreover, programming percentage requirements do not ensure that programming will be presented during times when there is a substantial audience. For example, a five minute informational program presented during prime time will reach more people than a half-hour program put on during fringe periods. A licensee should be given the flexibility to develop both the type of programming and the amount of programming that it believes will meet the needs of its community.

The record in both our Radio and Television Deregulation Orders demonstrated that licensees were performing at levels far above the minimum guidelines previously established. In addition, in 1977, we determined that specific program percentages were not appropriate for defining the term "meritorious" in the context of comparative renewal proceedings. *See Report and Order* in Docket No. 19154, 66 FCC 2d 419 (1977) *aff'd sub nom., National Black Media Coalition* v. *FCC,* 589 F.2d 578 (D.C. Cir. 1978). In sum, I see no compelling reason to return to this form of regulation.

Question. Commissioner Quello, many opponents of this legislation oppose the requirement that TV stations demonstrate that they have provided meritorious programming directed towards children. Do you believe TV programming directed towards children should be subject to different standards than programming directed towards adults?

Answer. Since 1974, the Commission has focused its regulatory regime on needs of the child audience. *See Children's Television Report,* 50 FCC 2d 1 (1974). Our most recent statement was in 1984, in which the Commission held that "licensees are

under a continuing duty to examine the program needs of the child part of the audience." *Children's Television Programming and Advertising Practices*, 96 FCC 2d 634 (1984) *aff'd sub nom., Action for Children's Television* v. *FCC*, 756 F.2d 899 (D.C. Cir. 1985).

In addition to the obligation to meet the needs and interests of the child audience, licensees are under additional requirements regarding children's advertising. Specifically, licensees are under strict requirements to maintain adequate separations between program content and commercial messages. The rules currently require licensees to refrain from any host selling or interweaving commercial messages into program content. At one time, the Commission also had time limits on the amount of commercial messages that could appear during children's programming. This requirement was eliminated by the Commission in 1984 as part of the Commission's *Television Deregulation* proceeding. Recently, the Court of Appeals remanded that part of our decision requesting further explanation. *See Action for Children's Television* v. *FCC*, No. 86-1425 (D.C. Cir. June 26, 1987). We are currently reviewing the Court's decision.

The proposed legislation in question employs the term "meritorious programming" in defining the children's program obligation. It is unclear, however, what the term "meritorious" means. As I have stated in my testimony before the Subcommittee, the term "meritorious" is extremely difficult to define. The word means different things to different people. I do not believe the term "meritorious" is either necessary or appropriate in defining a licensee's obligation towards its child audience. Our current programming obligations are sufficient to meet the needs of the child audience without unnecessary infringing on the editorial discretion of broadcasters.

Whether TV programming directed towards children should be subject to different standards is a difficult question. I think it is important that we look at each specific regulation to see whether or not it in fact accomplishes its objective and meets the needs of the child audience. For example, I believe it is entirely appropriate for the Commission to channel programming, which it finds to be indecent, to time periods where children are not present in the audience. *See* Public Notice, FCC 87-153, April 29, 1987. With respect to advertising, the Commission's current regulations prohibiting host-selling and interweaving of commercial messages also appear to be appropriate. As a general matter, I do believe that children constitute a special part of the licensee's audience and those needs should be met through programming.

TRAFFICKING

Question. Many of the opponents of the anti-trafficking rule contend that the industry is in the midst of a transitional period due to changes in the industry and reinstatement of the rule at this stage would be premature. How would you respond to that argument?

Answer. As I stated in my testimony before the Subcommittee, there are numerous factors which lead to the rapid turnover in broadcasting in recent years. However, I do not believe that the rapid resale of broadcast facilities is a transitory phenomenon. Since 1983, there has been a steady increase in the number of stations sold that were held less than three years. Mass Media Bureau's analysis of television station sales reveals that in 1983, 5.1% of television stations sold were held less than three years. This number increased to 28.1% in 1984, and 31.6% in 1985. In 1986, the amount of television stations sold that were held less than three years reached an astounding 52.1%. Date from Paul Kagan Associates corroborates this increase in short-term sales.

There is every reason to believe that short term station trading will continue. Station flipping has become a legitimate and, according to available data, increasingly popular investment strategy in the broadcast industry. The ability to sell off corporate assets is an integral part of the merger and acquisition process. In other words, broadcast stations must be sold in order to help finance large media mergers. In an otherwise healthy economy, rapid station trading will continue.

Assuming, *arguendo,* that the overall rate-of-station trading will level off, a more fundamental question must be addressed. Without the three-year rule, there is no assurance that future economic circumstances, or changes in our regulatory structure, will not converge to kindle the fires of acquisition and rapid station trading. Sound public policy dictates that the Commission adopt a transfer policy that promotes stability in long term planning in the industry. The peaks and valleys of the business cycle offer no such assurance. Therefore, I do not believe that reinstitution of the anti-trafficking rule would be premature at this time. When the Commission

first adopted its anti-trafficking rules, 53% of the stations sold were held less than three years. Given the figures presented above, it appears we have come full circle. The policy concerns that moved the Commission to act in 1962 apply with equal force today.

Question. In view of the heavy debt that many station owners have incurred in order to acquire properties, if reinstatement of the trafficking rule depresses station prices, could the rule have an adverse impact on station operations?

Answer. It is not entirely clear that reinstatement of the anti-trafficking rule will, in fact, depress the station prices. I am not aware of any hard econometric data that leads to the conclusion that station prices would be dramatically depressed with the reimposition of the three-year holding rule. Moreover, I do not believe the rule would have an adverse impact on the day-to-day operation of a station. Depressed station prices would come into play at the time the licensee attempts to sell the station. Reimposition of the three-year rule should have no effect on the day-to-day cash flow prospects of a broadcast facility.

Assuming, *arguendo,* that the three-year rule does depress station prices, there may be a potential for adverse impact in situations where there has been a heavy leveraged buyout. In these situations, the new owner may need to sell several broadcast facilities in order to meet financial commitments of the takeover or merger. For transactions that have already taken place, one would assume that the spin-off transfers necessary to effectuate the merger have been already consummated. Obviously, if legislation were enacted, it would be applied prospectively. Mergers and acquisitions taking place during the transition period could be examined on the case-by-case basis to see whether or not a waiver of the three-year rule would be appropriate. The Commission has traditionally granted waivers of the three-year rule in cases involving economic hardships.

Question. Commissioner Quello, in your testimony you indicated that it may be time for the Commission to reconsider its decision to eliminate the requirement that applicants submit evidence of their financial qualifications. Do you believe that this requirement should be reimposed on all applicants for authorization to operate broadcast stations?

Answer. For the past five years, the Commission has required broadcasters to certify that they have the necessary financial qualifications to operate a broadcast station. Unfortunately, some applicants for broadcast construction permits certify that they have the requisite financial qualifications without any basis or justification. False certifications have created problems for the Commission by wasting resources and delaying service to the public. On March 19, 1987, the Commission issued a *Public Notice* (FCC No. 87-97) informing all applicants that the Commission would randomly audit the financial qualifications of applicants for broadcast construction permits. This policy was adopted to deter applicants from misrepresenting their financial qualifications and abusing the Commission's process. If the audit detects that an applicant has falsely certified its financial abilities, it may be designated for a hearing on the issue of misrepresentation.

Ultimately, I believe the requirement may have to be reimposed on all applicants for construction permits. While the industry is generally in good health, the Commission should take steps to ensure that service to the public is provided on an expeditious basis. One means of accomplishing this task is to make sure that applicants have the financial backing to build a station before we grant a construction permit. Such a requirement will reduce the need for endless extensions of time to build the facilities. If our new audit procedures prove to be ineffective, I believe we should adopt a requirement that applicants submit evidence of their financial qualifications.

MINORITY AND FEMALE PREFERENCES

Question. Mr. Quello, do you believe that the minority and female policies have succeeded in increasing the number of stations owned by minorities? Do you believe that the policies should be continued?

Answer. Generally I believe that our minority and female ownership policies have contributed towards increasing the number of stations that are owned by minorities and women. Because the Commission currently has a pending *Notice of Inquiry* on this very issue, I do not believe it would be appropriate for me to give conclusory statements at this time. *See In re Reexamination of Minority Ownership Policies,* 1 FCC Rcd. 1315 (1986) *as amended,* 2 FCC Rcd 2377 (1987). I would also note that other factors such as broadcast experience, civic leadership, diversity, integration of ownership into management also serve as important factors in determining qualified broadcast ownership. However, I have gone on record stating that those seeking

to eliminate our minority and female preference policies have a heavy burden to prove that the policies do not serve the public interest.

EXCHANGE OF BROADCAST STATIONS (UHF/VHF SWAPS)

Section 501 of S.1277 would prohibit noncommercial VHF facilities from "swapping" channels with commercial UHF facilities. I wish to go on record stating that I agree with the proposed legislation. As a general matter, I do not believe it is in public television's best interests to allow noncommercial VHF stations to swap their facilities with commercial UHF stations. I therefore support the proposed legislation.

The CHAIRMAN. Well now, Commissioner Quello, you are saying that you would support the removal of that sunset provision on the must-carry rule. Is that correct?

Mr. QUELLO. Yes, sir.

The CHAIRMAN. And both of you as commissioners have reaffirmed in language and in spirit here the public interest obligation, the public interest standards. And that is important because my colleague has postured me as tell them what to do. This is the Senator, if you remember, that struggled with our former chairman, Pastore, trying to extend the licensees to get away from the bureaucracy and the cost and the regulation. And the deregulation that is now on the books—this is the Senator that sponsored it.

So, I am not against deregulation. I am for care and caution and watching the trends and being realistic in trying to maintain the excellence of the broadcast media that we have in this country. And it is now deteriorating.

And I would go specifically, Chairman Patrick, when you talk of the rules and policies—first, this two-step approach, Chairman Patrick, that you and Commissioner Quello both agree upon. What are the regulatory requirements? I am a broadcaster, let's say. And what am I to comply? What are, generally speaking, those regulatory requirements that reflect that public interest obligation?

Mr. PATRICK. Mr. Chairman——

The CHAIRMAN. You know, be honest. You keep money records. You do not steal. You don't use seven dirty words, and obvious things of that kind. But what are the things in there now that you think—you got the two-step. You got my attention. I would like two-step. If you could do it in one step, fine.

I am not trying to fill up the books with regulations, but I am trying to reestablish that public trust.

Mr. PATRICK. Correct.

Mr. Chairman, let me first very quickly, if I might, comment upon this question of the relationship between deregulation and the public interest or the public trust. Just very quickly, I would like to endorse the words of Senator Packwood and in summary say that I believe very strongly that the Commission—and this is set forth, in fact, in the statute—licenses broadcasters in the public interest. And I believe that broadcasters do have public interest responsibilities.

The key question, of course, is how we identify the proper execution of those responsibilities and how we create the proper incentives for broadcasters to fulfill those responsibilities. And there, presumptively, I am much more disposed to rely upon the incentives that exist in a competitive marketplace rather than relying

upon government regulation, although there are some circumstances in which regulation is appropriate.

Now, to answer your question, Mr. Chairman, even post-TV deregulation there are a number of obligations that remain. They include, specifically, an obligation to program to meet the needs and interests of the community of license. In fact, there is a specific obligation to program to meet the unique needs of children within that community of license. These obligations, as a general matter, have been retained and exist even after our deregulation with respect to both radio and television.

There is an obligation to maintain a public file—and that public file has to reflect a number of pieces of information, including complaints.

But also, very significantly, Mr. Chairman, there is an obligation that broadcasters keep within that file a quarterly list of at least five to ten issues and the programs that were aired responsive to those issues, which reflect in the opinion of the broadcaster the most significant treatment of community issues within that quarterly period.

There are other obligations that have to do with access, political speech, equal time, with which I know you are very familiar. These obligations certainly continue. There are a number of non-content obligations that continue to apply to broadcasters: character qualifications, financial qualifications, ownership rules, a number of EEO responsibilities that continue—in fact, they have been strengthened in some regards lately—and then, as I say, the obligation to maintain a file that will reflect complaints that have been filed and information that the public may want to access in reviewing the performance of those broadcasters.

The CHAIRMAN. On the ownership rule, what is your view?

Mr. PATRICK. On ownership rules?

The CHAIRMAN. Yes. Is there too much traffic, not enough? We shouldn't disturb it? Let them buy and sell or what?

Mr. PATRICK. On the question of trafficking, Mr. Chairman, I oppose, and the Commission with the exception of Commissioner Quello opposes, reinstitution of the trafficking rules for a number of reasons. Number one, I think that there are a number of positive aspects to the ability to transfer properties.

Putting aside the question of particular pieces of regulation versus deregulation, certainly the Congress and the Commission have endorsed in general a competitive market system to provide in large measure for the regulation of the broadcasting industry. A key aspect of a competitive marketplace is the ability to transfer properties, to ensure that properties are transferred into the hands of those who will presumptively apply——

The CHAIRMAN. Let me just interrupt there because I am trying to save time.

We were trying to get competition, performance and excellence. In fact, that is what we said. We are going to do away with comparative renewal because we are satisfied with everybody who has got a license. Other than that one cloud that covers this relative to minority interest in women ownership, that is the only thing that disturbs us. In competition we did not find anything wrong with owner A against owner B who had—excuse me—nonowner B who

had no ownership. That was not the case at all. In fact, the trend was otherwise. Everybody was happy with the ownership, and we were going to give the advantage to that particular ownership by doing away with, which you both testified to, comparative renewal. So, do not give me an economics lesson about fundamental—the competition is to be able to buy and sell the station.

Other than that minority part, we do not contemplate in the Congress that a certain number of stations in the public interest change hands each year. Have you ever heard of that? I haven't.

Mr. PATRICK. No.

The CHAIRMAN. No. So, we were not interested at all in the hands-changing or being able to buy or sell. We were interested in the competitiveness of the programming and the public interest standards and an even better public service. So, that part of trafficking to be able to buy and sell was not in our minds. On the contrary, stability was in our minds—stability of the ownership. Do you see what I'm saying? That is why you and I are trying to get rid of comparative renewal to give that owner that kind of stability where he doesn't have to hire a bunch of Washington lawyers and do all of those ascertainment things and do this and do that and keep that record.

You are going in two different directions with that testimony. If you are going down the road with us in this bill, and you are by your testimony on comparative renewal, we are not trying to get a bunch of new owners other than some kind of obligation that we feel very keenly the State of Delaware still does not have a station. And they were up there yesterday celebrating the fact that the Constitution was 200 years old and Delaware was the first state. And still it is the only state without a TV license.

Mr. PATRICK. Mr. Chairman, maybe I misunderstood your original question. But let me try to be very clear and disaggregate two questions.

The CHAIRMAN. Yes.

Mr. PATRICK. The first question is whether or not the Congress of the United States should reimpose a mandatory three-year holding period on broadcast licensees. And as you know, this bill would do that. And I thought your question went to this point.

On that question, very briefly, I think a holding period would be a mistake. I think that the ability to transfer properties is key to a competitive marketplace, and by and large, it ensures that properties will be placed in the hands of those who are most disposed to program to meet the needs and interest of the community.

The CHAIRMAN. What would be the minimum holding period as you see it? If it is not three years, what is it?

Mr. PATRICK. The Commission's rule at present, which I think is working quite well, is that there is no holding period other than a one-year holding period after a comparative hearing or a lottery or where the property has been acquired by and through the minority ownership programs, that is, by distress sale or tax certificate.

The CHAIRMAN. But one year would be sufficient.

Mr. PATRICK. One year would be sufficient in those circumstances in which the one year period presently applies. And otherwise, I believe, and the majority of the Commission believes, that a

holding period above and beyond that is inappropriate as a restriction upon the marketplace.

In our view it would also create barriers to entry. If you say to me that, if I acquire this property, I must hold it for three years, you are increasing the risk substantially of that investment. A bank is——

The CHAIRMAN. Look, the track record, Mr. Patrick, is totally otherwise. With the holding of the three years, they have made millions and millions of dollars. No one has lost money. We have not had anybody complain other than the just common sensical observation that they just have persons with no obligation and you cannot catch them in a year, can't even catch them in a year. And you want a minimum of a year.

And these buyers and sellers come in, run a bunch of ads, take and do away with the news people. They are firing them right and left. You can hire them now. We used to look for press secretaries. There are plenty available.

The stations are firing them. They are not putting in news. You know, that is costly. These MBA whiz kids know how to cut costs, that market that you think and love.

This thing was built up to a true value. It is an astonishing, astounding the value of these radio and TV properties. But I am telling you diminishing it—I did not want to follow on with Senator Packwood's observation. He said don't worry. With five advertisements fore and five advertisements after, it will just be less advertisements rather than going out and buying.

I will tell you what they will do. They'll forget the station and they will start selling the tapes. That is exactly what the TV stations did. I mean, the regulator broadcasters started buying the cable.

This is a money-moving crowd, and we have got a public trust. And that trust is a fixed trust. It is not a moving thing or a marketable thing. And when you reduce it to a year, you have made it marketable thing. You can take the good reputation, you see, the long-established broadcaster who has built it up over the years, and you come as a hit-and-run driver with a one-year holding, as you say is all that is necessary, and do away with all the news people and everything else of that kind, all the cost of programming because next year you are not going to even be in a program, and you just take the money and sell it to somebody else coming along. And you have got your money, and the community is at a loss. That is what this Congress is worried about.

Mr. PATRICK. Mr. Chairman, if I might just respond to that.

The CHAIRMAN. Yes.

Mr. PATRICK. And this is on the question of trafficking. I would also like, if I could, to clarify my comments on the question of the comparative renewal standard, which is a question you also raised a moment ago.

But just to close out this question of trafficking, I think presumptively that transfers are appropriate and an integral part of the marketplace. I think that to restrict transfers is to erect a barrier to entry that will disserve the interest, mostly of the small and minority entrepreneurs for whom the cost of capital will increase if we reimpose a holding period.

But above and beyond that, this committee has said, and I believe, Mr. Chairman, you have said quite correctly, that the FCC should not deregulate for the sake of deregulation. And I happen to believe that. I think that deregulation may be an appropriate means to an end; in some circumstances it may not be. But we ought not to deregulate for the sake of deregulation.

By the same token, we ought not to reregulate for the sake of reregulation. And I, therefore, have to ask: What is the purpose of reimposing a three-year rule? If it goes to instability, I do not think that the numbers suggest that there has been or will continue to be a substantial amount of instability. In fact, in 1985 only 3.5 percent of all of the licensed broadcast properties were transferred after having been held less than three years. And 1986 was an aberrational year for the reason that broadcasters were anticipating the effect of the Tax Act. I, therefore, submit that those numbers are not numbers upon which we can rely. The numbers in 1987 so far look more akin to the relatively small numbers we saw in 1985. So, I am not sure that instability is a justification for a holding period.

Then we look at programming. This seems to be what comes up often when we talk about reimposition of the three-year rule—that there is an assumption that programming will suffer.

I have to tell you, Mr. Chairman, we have not seen any increase in complaints. In fact, we have seen very, very few complaints indeed with respect to the way stations are being programmed. A new owner, even if it is an MBA whiz kid from Harvard, will be disposed to maximize audience share. You do that generally with programming.

In our view, we have not seen a material diminution in the amount of news and public affairs programming, that is being provided. In fact, over the course of the last 10 years, a period of substantial deregulation, the number of hours that are provided by network news operations, as distinguished from their entertainment operations, has nearly doubled. That is because the market demands a certain amount of that programming. And we are seeing it continue. And I do not think that it is appropriate to assume that new broadcasters are by definition less interested in delivering to the public that which the public has an interest in seeing and hearing.

So, again, reasonable minds can differ. I certainly differ with Commissioner Quello on this, and he has a reasonable mind. But I do not see any need for the imposition of the three-year rule. And I see, in fact, substantial disadvantages.

On the question of comparative renewals, to the extent that my position on that may be ambiguous, let me say first of all, that we do endorse and applaud your interest in this issue. The process is in need of reform. We believe that structurally the reform we need is to move away from the comparative process and move into a two-step process. We also need to curb abuses of process, which your bill addresses.

The key issue here is the standard that will apply to the renewal in that first stage, the non-comparative renewal stage. What is the standard? The bill, as I read it, would propose the application of a "meritorious" standard, the question being whether or not the

broadcaster has provided meritorious service to the broadcast community.

We have very severe reservations about using that standard as the basis for this bill for the reason that it is essentially the same standard that the Commission has been attempting to use to determine when a broadcaster is entitled to a renewal expectancy. And what we have found is that the standard is enormously ambiguous and difficult to apply. Almost 10 years of litigation have not helped to clarify that standard, as a result of which there is a substantial amount of uncertainty which attaches to the use of that standard.

And the bottom line is that attempts to apply that standard result in essentially the government, generally by and through the administrative law judge process, supplanting governmental judgment for the judgment of broadcasters or second-guessing the judgment of broadcasters, with respect to their programming in an attempt to apply the standard of meritorious service. So, it has proven to be a very, very difficult and slippery concept which, therefore, raises substantial First Amendment concerns.

What we would suggest as an alternative is that the Congress consider utilizing a process in which renewal is granted if the broadcaster can demonstrate substantial compliance with the Communications Act, our rules, regulations and policies.

Now, as you pointed out by and through your first question to me, our regulations still involve a number of regulations which go to content. There is an obligation to program to meet the needs and interests of the community.

I have to tell you that I have some concerns about even that level of content regulation on First Amendment grounds. But the process that we have worked out at the Commission, post TV deregulation, is one that involves some degree of predictability and certainty for the reason that, for instance, we presumptively rely upon the judgment of a broadcaster with respect to programming its station. And challengers to that broadcaster have to demonstrate somehow that the broadcaster's judgment was unreasonable. Again, this involves some analysis of content of programming. I have some concerns about that.

But my point very simply is that that process, the Commission's current rules and regulatory process after television deregulation, provides more certainty and less opportunity for getting involved in content in a subjective way than does the attempt to apply this meritorious standard. And therefore, we would commend to you the possibility of focusing upon compliance with the Commission's rules and policies, which are reevaluated from time to time, rather than codifying this meritorious standard, with which we have had no success.

The CHAIRMAN. I have forgotten what the question was, but I promise not to ask it again.

Senator Packwood?

Senator PACKWOOD. That will teach you, Mr. Chairman.

The CHAIRMAN. Yes. Is it Friday or Saturday?

Senator PACKWOOD. In the bill that the Chairman and Senator Inouye have introduced, in the standard for regranting licenses for radio—forget television for the moment—it is written in the conjunctive. One, the licensee's programs as a whole have been merito-

rious, and then "and" responded to the interests and concerns of the residents in its service area, including the coverage of issues of local importance.

Let me start with Commissioner Quello. Commissioner Quello, in your judgment what does the word "meritorious" mean?

Mr. QUELLO. It is a very subjective judgment and it means something different to all five Commissioners. Maybe we can agree on it. But we had this discussion, debate, some time ago on the *Cowles* case. And the first standard discussed was superior. Well, superior would be impossible. Maybe in efficiency reports you are lucky if only 10 percent of the people are superior. So, then I proposed for "substantial." Then we finally decided on "meritorious" as the standard. To me it means that if you do your job, and do it well, and you handle your program, and——

Senator PACKWOOD. Wait a minute. What does that mean? What does that mean, you do your job and you do it well? That you can program whatever you want so long as you do it well?

Mr. QUELLO. Without complaints about the violation of any of the Commission's rules.

Senator PACKWOOD. Mr. Chairman, what do you think?

Mr. PATRICK. I think that your questions point to the fact that the meritorious standard is almost impossible to apply.

I have reviewed the case law in this area, and I have learned only the following: that meritorious means substantial. It means solid. (That is actually a word that is used in some of the litigation with respect to an attempt to define "meritorious.") It means something other than minimal. It has something to do——

Senator PACKWOOD. Minimal what? Does this mean the kind of programming, the length of programming, or how many commercials, or what? I don't understand the standard.

Mr. PATRICK. So far as I know—and I certainly do not purport to have read each of the cases—but so far as I know, that is not clear. The answer to your question is very unclear. The meritorious standard has something to do with programming a station to address issues of local concern. And it also has something to do with the station's reputation in the community.

As a result of that, our ALJs, administrative law judges, in an attempt to apply that standard, take testimony from community leaders and ask them questions such as: What is the reputation of this broadcaster in the community?

The point, Senator, is that it is an enormously subjective standard without clear guidelines. As a result, we, the Federal Government, simply second-guess the judgment of broadcasters with respect to the content of the programming that they provide to that community.

Senator PACKWOOD. Well, let me ask you. It is one thing if Nicholas Johnson is chairman of the FCC and another if you are. His definition of meritorious, might not be yours nor mine. So, how does a broadcaster know whether or not, when the broadcaster comes for relicense, the current FCC is going to judge the broadcaster as meritorious?

Mr. PATRICK. That is absolutely correct. Because the standard is so subjective, what it means may change depending upon the personalities of the persons involved. In fact, we had one case—and I

believe it was the *Cowles* case, which is now relatively famous—also known as Central Florida—in which the ALJs came to one conclusion with respect to whether the broadcasters programming was meritorious, the Commission came to another, and the Court of Appeals came to a third decision—all looking at the very same programming. It is a very subjective standard, very intrusive in First Amendment terms and not, in our view, an appropriate standard to use.

Senator PACKWOOD. Let me use a "for instance" then with Commissioner Quello and the Chairman.

I like classical music. I have a rather large collection at home and a large collection in my office. And I listen to it and I listen to the stations that program it. In my judgment a meritorious station would be one that played classical music all day long, perhaps accompanied by a program guide that I would be willing to pay $3 or $4 a month or $2 or $3 a month to get so I would know when it was going to come on. I really would not care if they played news or announced traffic reports.

Commissioner, in your judgment would that be meritorious programming?

Mr. QUELLO. I do not like the term "meritorious" any more than Chairman Patrick. But if you wanted me to make a decision on that, it provides a need for a community for classical music.

Senator PACKWOOD. Provides a what?

Mr. QUELLO. Probably a need for those that like classical music. I would probably say yes, but I would not judge it on that basis. I would want to judge it on the basis of how did it comply with our program and issues.

Senator PACKWOOD. Well, would that comply in your judgment?

Mr. QUELLO. Just playing music would not. You would also have to have meet your program and issues-responsive programming obligations along with the classical music.

Senator PACKWOOD. Why? From my standpoint as a citizen, that is an interruption that I do not want to hear.

Mr. QUELLO. That is a very good question, and very controversial. We can debate that forever, and I would probably end up on your side.

But I think there is a feeling in some places that you have to have some kind of a requirement that the station serves the community and its need for information. And that is why we have come up with a program, issues-responsive list even for classical music station.

Senator PACKWOOD. Let me ask you something about the old Simon Geller case because I think I understand what happened.

Mr. QUELLO. I am glad you asked. I am the only one who voted right on that case.

Senator PACKWOOD. I know. Well, you were there at the time. And I think I understand what happened.

He came up for re-license. All he did was program classical music out of his bucket shop operation in the basement. And he didn't have any news. He did have some public service announcements; the Garden Club will meet at the YMCA tonight, the schools are closed because of fog, or something like that. But he did not program any news.

Initially the Commission did not renew his license. It goes up the to court.

Mr. QUELLO. I dissented.

Senator PACKWOOD. I know. You did dissent. I am very familiar with that.

But the Commission took his license away because he was not serving the public interest—or was not meritorious if the word had existed in those days. It goes up to the Court of Appeals, comes back. I think this is what happened.

You found there were no complaints from the citizens in the town. There were 39 other radio stations that Gloucester citizens could receive, so they were not short of news or traffic reports. And this is what the Commission did when they finally said you can have your license back. They used as a justification for the public interest those public service announcements that he played.

And really, he did not comply with the fairness doctrine because he was not broadcasting controversial issues of local concern and arguing both sides of the issue.

Do I fairly assess the history of the case?

Mr. QUELLO. Right. My count actually was 44 other stations in the area.

Senator PACKWOOD. Forty-four.

Mr. QUELLO. Plenty of them providing news and public affairs. And so, he was providing a service that was distinctive and it was a one-man operation. It certainly wasn't a marketplace failure in this case.

Senator PACKWOOD. Now, I want to follow up on my question. Given the same kind of re-license situation again, would you be willing to say that would be meritorious, even if he was airing no news in the sense of news, public service announcements or maybe not any public service announcements? Is the programming of that kind of music a sufficiently "meritorious" serving of the public interest to justify re-licensing?

Mr. QUELLO. I think if there is plenty of news, public affairs and informational programming in the market, yes. And, where he was meeting the needs of classical listeners, I would vote for that.

However, I do not think you are going to have votes in Congress to be able to put that kind of a theory over, Senator. They are afraid that if there isn't some kind of a commitment there, that too many stations might engage in specialty programming. I do not agree with that theory. But that seems to be——

Senator PACKWOOD. Well, you are making a case I think the Chairman does not agree with—the Chairman of the committee. Your argument and mine is you say 44. I am delighted. If I want to hear a talk show all day, I will turn the station and I will hear a talk show all day. Or if I really want news, if there are 44 stations in the market, I'll bet you two of them are playing news all day long. And I have no trouble getting it.

Mr. QUELLO. More than that, yes.

Senator PACKWOOD. The Chairman of the committee would argue that we will not switch our dial. Despite the fact that there is a diversity, most people will not listen to very many stations so that unless the station that you listen to is diverse, they are not serving the public interest.

I do not agree with his theory.

Mr. QUELLO. No, but it is a difficult judgment because it will vary from market to market. I suppose if you had a one-station market and all it did is play classical music, it would not be serving public interest, but I do not see that ever happening. You usually get classical music only after the other news and public affairs stations have been on the market quite a while.

Senator PACKWOOD. My hunch is if you were the only station in a market, you wouldn't make money playing classical music all day long.

Mr. QUELLO. Right.

Senator PACKWOOD. And you wouldn't be in the market very long.

Mr. QUELLO. You are making a very good argument for the marketplace——

Senator PACKWOOD. Mr. Chairman, I am curious.

Mr. PATRICK. Senator, I think I agree. You make a very good argument on policy. As a matter of policy, I think that broadcasters should have a great deal of flexibility. And they should be able to take into account other programming that is available in the market. And if the need in that community is for a station that substantially devotes itself to classical music because there is enough news and public affairs programming available, I think one can make a very strong argument, as a matter of policy, that that sort of arrangement maximizes the public interest benefits derived collectively from the communications facilities in that marketplace.

But I have to add—and I know you know this—that as a matter of law, there is a problem. And that is a result of the fact that there continues to be, even after television deregulation, an obligation to provide a certain amount of issue-responsive programming. And that, of course, is what got Mr. Geller into trouble. Fortunately, that case antedated my arrival at the Commission.

Senator PACKWOOD. But there is the irony. When he got his license back, I think the Commission just swallowed hard and said we have no complaints and the public likes what he is programming or there are enough listeners who like it, and they have enough other news that we are going to give him his license back even if he doesn't program any news, which he didn't. I do not know if he is still in existence.

Mr. QUELLO. My attitude would be that if he has to meet our program and issues requirement, then he could do it by providing a service that would be of interest to classical listeners. There are ways that he could do it.

Senator PACKWOOD. So, in conclusion, Mr. Chairman, you are reasonably convinced that not only is the meritorious standard nebulous, subjective, it can actually be mischievous from a broadcaster's standpoint because the broadcaster may look at the existing Commission and say I've got them figured out pretty well. I kind of think I sense what they might regard as meritorious. But in a radio license, which is what? As I recall, 7 years?

Mr. PATRICK. Seven, yes.

Senator PACKWOOD. Who knows who is on the Commission 3, 4, 5, 6, 7 years hence when your license comes up for renewal on what they might think is meritorious.

Mr. PATRICK. That is exactly right, Senator. We have created a situation in which, because we apply such a nebulous standard to the renewal expectancy, broadcasters have to try to anticipate what the attitude of a certain number of persons is going to be about what constitutes meritorious service. What I think we would like to see is broadcasters responding to the needs and the interests, and the tastes and the demands, of the broadcast community that they are serving and also being prepared to take bold stands on issues of public concern.

Senator PACKWOOD. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Packwood.

Senator Danforth?

Senator DANFORTH. Thank you, Mr. Chairman.

First, let me say that I agree with the comments made by you, Chairman Patrick, and by Senator Packwood on the issue of what is meritorious. I just cannot imagine that that is a sufficiently clear standard to be constitutional. And if it is constitutional I would say that it is to me so subjective and so quirky that I cannot imagine we would want to write that into the law.

Do you believe that the standard should include whether or not the programming has responded to the interests and concerns of the residents of the service area, Chairman Patrick?

Mr. PATRICK. That is the standard, as you know, Senator, at present. There is an obligation to serve the needs and interests of the community.

I have some concerns as a matter of policy as to whether or not we ought to continue to in any way second-guess the judgment of broadcasters with respect to a meeting of that obligation.

Senator DANFORTH. There isn't a requirement anymore of broadcasters running around interviewing people, or is there?

Mr. PATRICK. That is correct. Those were our ascertainment rules and procedures. And they have been eliminated, which is to say that we no longer tell broadcasters how to ascertain the interests of the community. They do, however, have an obligation to ascertain the interests of the community and to program to meet them.

Senator DANFORTH. Can't they ascertain the interests of the community by looking at their ratings?

Mr. PATRICK. Well, I think that is one fair indicator of the sort of programming that that community is interested in, yes.

Senator DANFORTH. Well, I must say that the whole thing to me is questionable, whether this should be in the law.

Let me also say that with respect to the anti-trafficking rule in this bill, the three-year rule, I also agree with you. I do not understand why we should have a three-year rule for selling stations.

Now, let me get to another set of issues, and that is the multiple ownership provisions. What is your thought, Commissioner Patrick, on this duopoly rule and the one-to-a-market rule and the cross ownership rule? Are those good ideas, or do they appear to be a little rigid?

Mr. PATRICK. Senator, let me start by saying that I believe that maintaining some quantum of diversity in local markets is important. That having been said, I also think that it is incumbent upon the Commission from time to time to reexamine all of our rules to ensure that, in light of the present marketplace circumstances,

those rules are maximizing the public interest benefits derived from communications facilities rather than in any way impairing them.

That having been said, I think that the inquiries that we have initiated with respect to some of our local ownership rules are very appropriate inquiries and are soliciting information with respect to issues that we should be looking at.

Specifically, as to the duopoly rule, we have asked whether or not the lines that we draw to define the measurement for prohibited overlap between two stations are the appropriate lines. There has been some suggestion that the way we measure the prohibited overlap for AM stations puts the AM service at a competitive disadvantage vis-a-vis the FM service for the reason that the lines that apply to AM provide for a less strong signal than the lines would provide for in the FM service.

Well, if we have a rule that is not providing any public interest benefits in terms of diversity or any other material benefits in that regard, and is impeding the competitiveness of the AM service, which is a substantial issue at present, I think we should take a look at that, again always keeping in mind that what we want to do is balance our concern for diversity against our indisposition to have rules that impede in any inappropriate way the competitiveness of a particular service.

Senator DANFORTH. Should we write the duopoly rule into statute?

Mr. PATRICK. No. I do not think so.

One of my concerns about this legislation is that it, as I read it, prohibits any alteration of the local ownership rules. I think, as I have indicated, that diversity is a concern in the local marketplace. But I think at the same time, in light of the incredible changes that are taking place in this broadcast marketplace, the Commission, the expert agency which you, the Congress, have created to look at these questions from time to time, ought to have the flexibility to look at these questions in light of those changed circumstances.

For instance, we are examining the one-to-a-market rule, where again our interest is driven by a concern about the competitiveness of the AM service.

The statute, as I understand it, might also preclude our ability to look at the cross-interest policies, and our desire there is simply to clarify exactly what those rules are. Right now they are enormously uncertain. And that imposes costs upon the industry which are not beneficial in public interest terms.

We want to look at that. We want to clarify those rules. We want to retain those that are appropriate and eliminate those that are now inappropriate or have been subsumed in the attribution rules. It seems to me that that is exactly the sort of thing that this Commission should be doing in order to maximize the public interest.

Senator DANFORTH. Then it is my understanding that your view is that the objective sought, which is diversity within a market, is a desirable objective, but the idea of freezing these rules into statutes, as opposed to allowing some flexibility to the FCC, is a mistake.

Mr. PATRICK. I think that is right, Senator.

Senator DANFORTH. Well, I would agree with that position also. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Exon?

Senator EXON. Thank you very much, Mr. Chairman.

Let me ask a question, if I might—a general question and let him have a chance to respond—of Chairman Patrick.

Chairman Patrick, I generally find and my voting record and views on this whole broadcasting matter probably parallels to a considerable degree your opinions as expressed here in your written statement, at least what I perceive to be your position with regard to this very important bill.

Now, having said that, I come back on the other side of the coin. I think we have got to recognize that we still have a limited number of frequencies. We still have some obligations to meet what many people think are tremendously important in regard to public broadcasting and those kinds of things.

Since you are evidently opposed to most or all of the important features in the bill that we are discussing here this morning, could you outline for me how you feel that some protection might be afforded those who have to some extent legitimate concerns? You certainly are not for, as a part of deregulation, those who own broadcasting licenses at the present time and not responsible at all to the Federal Government or anybody else. In other words, they are not locked in forever hereafter, are they?

I am not sure I understand where you are coming from exactly. Could you help me out?

Mr. PATRICK. We'll see, Senator. I will certainly try to help you out with that.

Let me just state as a general proposition that I do believe and agree with you that broadcasters have public interest responsibilities. I believe that anyone who controls a medium of mass communications in a democracy has tremendous responsibilities to the public. The key issue is how we ensure that those responsibilities are recognized, identified and met. I believe that, in general, we are well advised to rely upon a competitive marketplace and the incentives which result from that marketplace.

Senator EXON. You talk about a competitive marketplace. If you do not have any rules or regulations to insure that there is a competitive marketplace, how do you have one? That's my point.

Mr. PATRICK. It is a very fair question. I think that where there is demonstrated to be a defect in the marketplace, an anomaly, such that the competitive incentives are not proper, then that is a proper area for regulation.

But going to the heart of this matter, I think that the broadcasting industry today is so intensely competitive that there is in fact an incentive among broadcasters to program to meet the needs and interests of their broadcast communities. And in fact, I think what we have seen over the years, in terms of the amount and type of programming that is provided, is consistent with that proposition.

Senator EXON. What are you saying? Just don't bother with all these laws and all these specifics that you want to include in this bill that we are discussing here, and leave it up to the FCC—is that what you are really saying—in their good judgment to enforce

some of the requirements that evidently you think are necessary regarding—you know, we are touching on the fairness doctrine here to some extent, but of course not directly. What are you saying? Leaving it up to the FCC and don't write specifics into law? Is that your bottom line?

Mr. PATRICK. It is a question of what specifics we write into the law.

In fact, you mentioned earlier that I oppose most of the parts of this bill. I do have reservations about a large number of the parts, but the basic idea in this legislation, as I understand it, is to reform the comparative renewal process; to go from a comparative process to a two-step process. And I endorse that idea. I think it is an appropriate action to take, and I applaud the Congress for tackling this very difficult question.

The issue is what the standard will be for renewal during that first stage of consideration. And on that I do differ with what is proposed in the legislation. What is proposed is a meritorious standard. I have problems with that on First Amendment grounds because it necessarily involves very subjective judgments about the content of broadcast speech.

I have problems with it because I think in general we can rely upon marketplace incentives to deliver programming that is consistent with the needs and interests of the community.

And I object to the meritorious standard for a third reason, Senator, which is not really a philosophically driven reason. The first two points obviously are philosophical; the third point really isn't. And that is that the Commission has already attempted to use this meritorious standard to identify when a renewal expectancy is appropriate, and it has proven to be enormously difficult to apply because it is very, very subjective.

So, to answer your question, bottom line, what I have suggested is that we do have a renewal process that needs reform and we should go to a two-step proposal as this legislation would have us do. But the standard we apply in the first instance should be whether the broadcaster substantially complied with the Communications Act provided by Congress and the rules, regulations and policies enunciated by the Commission pursuant to that Act.

Senator EXON. One last question of you. Some broadcasters have said that the reason for the increase of the sales of stations—and there has been a great deal of that—was the tax law last year, and that there simply was a move to get in on the capital gains advantage. And that was, above everything else, the reason for so many changes in ownerships of stations. If this is true—and do you think it is—isn't it just possible that this is a temporary phenomenon where we have all this competition and that we may go back to more normal conditions in the immediate future?

Mr. PATRICK. Yes, sir. I think that, in fact, the tax act did have a lot to do with the number of station trades that we saw in 1986. And I think the numbers bear that out. In 1985 the number of stations traded that had been held less than three years, as I mentioned earlier, was about 3.5 percent of the total stations traded. That percentage went up substantially in 1986, I think as a result of anticipation of the Tax act. And the numbers in 1987 are now closer to the 1985 numbers. So, the answer to your question about

the impact of the tax act is yes, that did have a lot to do with station trades.

I think that we are going to see a stabilization in the amount of trading going on. There are a number of things that contributed to the degree of station trading that took place in the past couple of years, a belated recognition of the value of broadcast properties being one.

Senator EXON. Mr. Quello, I just want to give you an opportunity to comment because I know your position on most of these. Is there any general or specific comment you would like to make in my line of questioning with Mr. Patrick?

Mr. QUELLO. I have a different opinion than Chairman Patrick on trafficking. I agree with the Chairman and his concerns on the term "meritorious."

And I would like to keep the flexibility contained in our multiple ownership. At one time we had special rules trying to help FM radio. Now AM radio is under siege, and I think we need the flexibility to meet these problems as they occur. Also, you have a competitive marketplace. You are more competitive than ever before. More television stations, more radio stations, and more unregulated competition from cable that is now aggressively selling spot announcements. you also have unregulated competition from MDS, satellite, even VCRs. So, I would like to see us retain that flexibility.

But trafficking is where I have a major disagreement with the Chairman. It is an honest one. I have never seen such turmoil as we had in 1985 and 1986,.and I was in the business myself for 28 years. And I do not think this serves long-range programming interests. I do not think it serves the public interest.

The trend is up. We know that some of this was caused by the change in tax laws, but you had such change from 5.1 percent of sales involving television stations held less than three years in 1983 to 52 percent of sales in 1986. So, the trend, regardless of changes in the tax laws, is up.

At one time I think broadcast properties were considered rather difficult to take over. I think once we eliminated the anti-trafficking rule the perception was that it is not only possible, but easy. As a result you had such things as a lot of properties, that were carefully built over 40 or 50 years, placed in play and under seige by people that want to take it over and cash in a fast profit.

Now, earlier there was quite a bit said about they have to hold the properties one year. That is not true of transfers or if someone buys a property. They do not even have to hold it for a year.

Some examples of the new economic environment would be, for example, CBS, first Ted Turner, then Boesky, then Marvin Davis, finally they found Larry Tish. In the meantime they accumulated a billion and a half in debt. There is only one way you are going to handle that. You are going to have across-the-board reductions in everything, including programming.

Multi Media was a fine company. They saved themselves, but once we installed the trustee concept for a hostile takeover, they immediately paid Jack Kent Cooke $25 million. Now, Jack Kent Cooke is too big to say he went after them deliberately for green

mail, but nevertheless, it was our process and the easy takeover made this thing possible.

We have had a storer built over 40 or 50 years cashed in for assets. We have KKR selling six of their stations without a holding period. John Blair has done it. To me, I have been in business a long time. I see these people that have done a good job over 40 or 50 years, had their license renewed, cashed in against their will.

Now, not all sales have been bad. I mean, some of them have been friendly, with very responsible people. But where this started—it has kind of amazed me that the broadcasters themselves oppose this because where this got started was over two years ago at the NAB. I was on a panel at the convention, not last year, but the year before. Congressman Al Swift was on the same panel. The broadcasters in the audience got up and said we thought people bought broadcast properties to be broadcasters not to trade them like commodities. And that is what happening.

So, I do not know what happened on the recent vote at the NAB. I think there are some split feelings over there or the fact that some people feel most of the transfers already have taken place.

The fact is that we had several rule changes: a 12-12 rule rather than a 7-7 rule, the ownership attribution rule was relaxed, and we have the rush for capital gains. The fact is that just by one simple step—reinstitute the three-year holding rule—you stop this rapid turnover in broadcasting.

Now, the question comes up what do you do with someone that is in a hardship case that may have to sell. The Commission always had a very reasonable waiver policy. We have a waiver policy for any exceptional or hardship case. The point is when you come to us for a waiver, we maintain control of the process and you do not have a market running wild. I know there has been a lot of comment on this issue.

So, I feel very strongly that this could be a two-tier thing. If you reinstitute the three-year rule, I think that itself would reemphasize the public interest standard in broadcasting. And you have that with a renewal expectancy without all the Christmas tree hangings. I think we have got a very good piece of legislation.

Senator EXON. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Pressler?

OPENING STATEMENT BY SENATOR PRESSLER

Senator PRESSLER. Mr. Chairman, I congratulate you on holding these hearings. I have an opening statement which I shall place in the record, but I will summarize from it.

Mr. Chairman, I would, first of all, like to say that I was Deputy Whip on the Senate floor this morning which means there were no other Senators willing to be there, so I had to be there. So, I apologize for being late looking after the interests of the Republican minority.

The Broadcast Improvements Act of 1987 is an important piece of legislation which merits our careful consideration. I am reserving judgment on this legislation until hearing from these witnesses

today and next Monday. But there is one portion of the bill about which I feel so strongly I just wanted to make a brief comment on the onset.

I am a strong supporter of the must-carry rule and am pleased to see that this legislation eliminates the FCC sunset provision in this respect. Indeed, I would be very interested in broadening the must-carry rules and believe that we could go further into the FCC while still remaining within the constitutional guidelines set forth by the Supreme Court in its *Quincy* decision. Education television serves a tremendous public interest in this country, and I believe we should do everything possible to ensure its continued viability.

With that, Mr. Chairman, I have some questions, first of all, for Dennis Patrick whom I welcome here. And if you have covered these, I will read the record. But I understand these have not been covered.

Let me ask some questions on the record keeping provisions of this bill. As I understand your testimony, you believe that these provisions would be unduly onerous on both the FCC and broadcasters. I have a couple of questions on this.

First, S. 1277 requires that the FCC randomly audit 10 percent of television renewal applicants every year in order to insure compliance with its record keeping requirements. Roughly, how many applicants would this be?

Mr. PATRICK. Senator, it is a little bit difficult to answer that question because, as you know, there are fixed terms for these licenses, both radio and television. And therefore, one tends to have waves of renewal applications. As I understand it, we are coming up to a period in which we are going to be receiving a large number of broadcast renewal applications.

We have not had a large number in the past. I received in my briefing materials some indication of the number of renewal applications.

Senator PRESSLER. Do you have a ball park figure? That thing has been floating around—S. 1277.

Mr. PATRICK. Yes. Unless Bill Johnson has that information at hand, I will provide that information in the record and give you an exact number or at least an estimate of the number of renewal applications that we anticipate in the next couple of years.

Senator PRESSLER. Is there any way to estimate the number of employees or budget costs associated with the FCC's role in carrying out its auditing and other record relating responsibilities in this bill?

Mr. PATRICK. Yes. We could. It would obviously require some resources to be assigned to that task. But yes, if the committee felt that it would be useful information, I could have our managing director estimate the amount of manpower hours and the budget resources it would take to comply with the proposed provisions of S. 1277, yes, sir.

Senator PRESSLER. Can you put any dollar figure on the economic burden this record keeping will cause for broadcasters?

Mr. PATRICK. I can't today. I could attempt to get that estimate for you. I think it is going to be difficult to provide a precise number for the reason that, as you know, the legislation calls for an audit of 10 percent of the non-contested renewal applicants. And

we are, as I understand it, to apply to those applicants this standard of meritorious service. And because that standard is so difficult to apply—because it's subjective, number one, a substantial amount of resources may be required. Number two, it may be very difficult for us to estimate in advance. That is part of the problem with that standard.

Senator PRESSLER. Do broadcasters keep these type of records anyway as a general practice?

Mr. PATRICK. As you know, we have eliminated a number of our specific record keeping requirements, those requirements which actually tell broadcasters how to retain information with respect to broadcast programs. But my understanding is that by and large broadcasters do retain records with respect to their broadcasts in anticipation of renewal, especially today where, with respect to renewal expectancy, we apply this concept of meritorious service, which is a very difficult and unclear standard to apply.

Senator PRESSLER. Now, I understand that you oppose the antitrafficking provisions of this bill. Is that correct?

Mr. PATRICK. That is correct.

Senator PRESSLER. I too have concerns about restraint on alienation of property. But I believe there have been some trafficking abuses. Do you believe there have been some trafficking abuses?

Mr. PATRICK. I just do not know exactly how to define abuse. All of the transfers may not have been motivated by a desire to acquire the property and broadcast in the public interest. I cannot second-guess the intentions and the motivation of those persons who have transferred properties in the past couple of years. It is very difficult to say.

I do not think in that regard, however, that all of those transfers that have involved a quick turnaround of the property necessarily should be dismissed as or categorized as abusive. There are circumstances in which investors will acquire a property which they believe is not living up to its potential in the market, not serving the needs and interests of the public well enough. They go in. They make changes. They make adjustments. And they sometimes improve the performance of that property, and then turn around and sell that property. And sometimes they make a substantial profit. But I am not sure that we should necessarily dismiss that sort of transaction as antithetical to the public interest. It may be that that entrepreneur has put that broadcast property in a position to better serve the public interest in the long run.

One of the things that I think we have to recognize up front is that we, the Congress and the Commission, have endorsed a competitive model for the broadcast industry, and we have been very successful in inducing a large measure of competition, in creating a very intensely competitive environment.

One of the things that one expects to happen in response to increasing competition is reorganization of the businesses that are participating and competing in that market. I do not think that we should necessarily assume it is bad that broadcast properties are reorganizing and applying their resources in different ways and attempting to have structures that are leaner in certain regards in order to put themselves in a position to compete better in this intensely competitive market.

Therefore, it is very difficult to judge what constitutes an abuse.

Senator PRESSLER. Is there any language on anti-trafficking you would like to see? This language is not acceptable to you. Or would you just like to see none? Is there anything you would like to see in this area?

Mr. PATRICK. As you know, Senator, we used to have an anti-trafficking provision, and we eliminated it. The rule now is that there is no holding period required other than a one year holding period required after comparative processes, lotteries or where the property is acquired through some of our minority ownership policies. And that, I think, is the appropriate policy. So, I am not looking for any language or any statute on this subject.

Senator PRESSLER. I would like to ask Commissioner Quello based on his vast experience and welcome him. Do you believe we could constitutionally expand upon the FCC's must-carry rules, or do you feel you have stretched the matter as far as the Supreme Court's Quincy decision will allow?

Mr. QUELLO. First, I am against sunsetting any must-carry without first having some kind of a record of how it has worked. So, I agree with you. I am definitely against the must-carry sunset.

On First Amendment rights of the cable system, with *Quincy* and the *Turner* case, I was a little bit amazed that the court came up with that kind of a decision. I think the FCC made a serious mistake in not appealing the court decision when we were practically invited to do so.

Finally, in the agreement between the broadcasters and the cable industry and a lot of congressional intervention, we did come up with approving some kind of a must-carry rule that is now in effect. And even that rule is now, as you know, being challenged in court by cable.

So, we do not know for sure what we are going to end up with. We might end up with no must-carry. We might end up with the rule that the FCC crafted. I thought we did a reasonably good job. In the event the broadcasters prevail, maybe you would come back with full must-carry.

I have a tendency to think that full must-carry served the marketplace the best. I was for full must-carry, if you are asking me that question. I do not understand giving one entity First Amendment rights when the broadcasters cannot get full First Amendment rights, and the broadcasters are the ones that originate most all of the local news and local public affairs.

So, I disagreed with the court decision. It is too bad we did not appeal it right off the bat. We do have something in place now. I hope it stays, but as you know, Senator, there is an appeal. NCTA is not appealing it, but two very large important entities in cable are appealing it.

Senator PRESSLER. Mr. Quello, is there some way to work in a bit more flexibility in the anti-trafficking provisions of this bill and still prevent trafficking abuses?

Mr. QUELLO. I do not know. Someone said what is magic about three years, why not two? And the three-year rule came about—I think before you came in here. It was promulgated back in 1962 after two years where the percentage of stations that were being traded got up to 45 percent, and at another point 53 percent. At

that point the FCC said we have to stop this turnover. We do not think this serves the programming or public interest and so, we came up with a three-year rule. At that time you had a three-year license renewal. So, that is the only magic of three years.

Now, I think it's a reasonable time to hold a station. There is not even a one-year holding rule on a station acquired by a transfer. I am going to have a hard time making an earnest public interest finding if someone comes up and wants to buy a station but does not want to hold it for three-year period because I think it takes that in order to actually efficiently have long-range programming and long-range service to the public. I do not see how you can do it with a fast turnover.

If someone is not willing to hold it for three years without some kind of extenuating circumstance, where we have reasonable waiver provisions, I do not see his intention of buying is to serve the public interest. Broadcasting is different than another entity, it is a government-licensed property. If you are going to buy it, hold it for three years, or even if I am alone, you will not get my vote.

Senator PRESSLER. I might conclude by asking Mr. Patrick for his feelings on my first question to Mr. Quello regarding if you believe we could constitutionally expand upon the FCC's must-carry rules and how you feel about that. Or do you feel that it has been stretched about as far as—the matter as far as the Supreme Court's decision in Quincy would allow?

Mr. PATRICK. Senator, to answer your question succinctly, I believe that the Commission's decision pushes the *Quincy* decision about as far as we can go and have any reasonable hope of sustaining the rule's constitutionality.

Senator PRESSLER. All right. Thank you.

Senator EXON. Thank you, Senator.

Gentlemen, thank you very much for coming and giving us expert testimony this morning which has been very helpful. We appreciate that, and you are excused. Thank you very much.

In the interests of time, I am going to call panel 2 and panel 3 at one time because I know that there is keen interest in this matter, and we have taken a long time this morning. I appreciate if panel 2 and panel 3 witnesses to be as patient as they have been.

Therefore, at this time I call to the witness table Mr. Paul Kagan of Paul Kagan Associates, and then panel 3, Ms. Peggy Charren, president of the Action for Children's Television; Mr. Norman Pattiz, chairman and chief executive officer; and number 3, Pluria Marshall, chairman of the National Black Media Coalition; Mr. Richard P. Ramirez, Astroline Communications Company. We would ask those witnesses to take five chairs at the witness table.

I would say to all of the witnesses that there have been some developments on the floor that have caused the Chairman to go to the floor. He hopes to return very briefly. But I know that you have other appointments and so does the acting Chairman. And so, I would like if we move ahead at this time, and I will recognize first Mr. Paul Kagan. Mr. Kagan, welcome.

STATEMENT OF PAUL KAGAN, PRESIDENT, PAUL KAGAN ASSOCIATES, INC.

Mr. KAGAN. Thank you, Mr. Chairman and in absentia members of the committee. Thanks for allowing me to come here today to voice my opinions. I have prepared remarks that I am placing in the record, but I think I would like to depart from them and speak informally just for the few minutes that I have.

Senator EXON. I appreciate that very much. And I would like to ask the other witnesses to do that. Your prepared statement will be included in the record, as will the prepared remarks of the rest of the panel.

Mr. KAGAN. Thank you.

The subject I would like to address specifically for these few minutes is something that has come up in this controversial discussion of the legislation, especially this morning with the FCC Chairman and Commissioner Quello. There is a great deal of discussion about the fears of fast buck artists sweeping through the broadcast industry, and that the industry has been reduced to something of a casino atmosphere where stations are being traded like commodities.

And throughout some of it, the data being cited as examples are our data. Our company probably devotes more resources to analyzing the financial aspects of the media than any company in the world. And we have been tracking the sales of all the stations going back for nearly two decades. In fact, we have placed into the record the list of all the major station sales in history, and certainly the trading record of the last five years, which is under discussion in this legislation.

I would like to note first that in our submission with our testimony there is a paragraph that should be noted by anyone utilizing this data. And that specific sentence within that paragraph says: "There is nothing in the data to indicate that TV stations are being traded like speculative commodities responding purely to price." And for just a couple of minutes I would like to discuss what has happened in the last four and a half to five years since the holding period rule was dropped.

In looking at the record of station sales, we find that in television, for example, there were only two to three dozen stations trading a year in the 1981–1982 time frame when the holding rule was in effect.

The sales jumped dramatically beginning in 1983 to make it look as if the elimination of the trafficking provision was the cause. In fact, what began to happen in the 1983 to 1986 time frame was a historical coincidence of economic factors of which the elimination of the holding rule was only one and a small one. Interest rates plummeted and a large availability of funds became available to investors at low interest rates. At the same time companies whose stocks had not been under their own control began to be accumulated by institutions and individuals. The institutions have a fiduciary responsibility to maximize their return on investment and as a result, managements were required to increase their attention to the bottom line.

What had been a heavily restricted marketplace changed in the early 1980s and became less restricted and more responsive to economic conditions, all of which were conducive to increasing the value of the properties and also conducive to changing the ownership of some of these companies. Managements that had been entrenched for years within this restricted marketplace found that they had to improve their performance for their own stockholders. And that is where the idea of a takeover era came along.

Actually the takeover era never occurred. There have only been three major station transactions in all these years that were even induced by the threat of a takeover. And they were not really unwanted takeovers because what has happened is the stations have been transferred primarily to other media veterans and very often to the managements of the companies themselves.

Just for example, Commissioner Quello talked about the vast number of stations traded in 1985 and 1986. I can name two transactions, Cox Communications acquiring majority control of their own company and ABC selling all of their properties to Capital Cities. Both of those transactions involving long-established and highly respected broadcasters accounted for 44 station turnovers or trades during that time period and a tremendous number of dollars. In fact, in the last four and a half years only 26 percent of all the TV stations traded have accounted for 81 percent of all the dollars spent on buying TV stations in that time.

So, the net effect of all of this activity has really been that a large number of stations have been involved in a relatively small number of deals. And all of the deals that have accounted for these large dollar amounts have all involved either media veterans or in a few cases companies that had extensive experience in similar businesses, and all of whom appeared to be in the business for the long run. We are hard-pressed to find any fast buck operators at all in most of the significant trades—in fact, all of the significant sales of stations in recent years.

I would be happy to answer any questions you may have.

[The statement follows:]

STATEMENT OF PAUL F. KAGAN, PRESIDENT, PAUL KAGAN ASSOCIATES, INC.

Mr. Chairman, members of the Subcommittee . . . My name is Paul Kagan and I appreciate your invitation to be here today to voice my opinions about proposed legislation regarding radio and TV station ownership. I feel qualified to do so because I have spent my entire 29-year business career in the media, including eight years as an announcer and executive in local and network radio and the last 19 years as a financial and securities analyst. I now employ more than 50 people. We publish 22 monthly newsletters on various aspects of broadcasting, cable TV and other entertainment and electronic media. We publish several reference works, including the only national census of cable and pay TV subscribers as of a single date each year. We conduct two dozen seminars annually. In the past 14 years we have appraised $6 billion worth of media properties and we are the only company in the nation that maintains a valuation database of all the publicly held companies in both broadcasting and cable TV. We also manage investments for individuals, companies and pension funds. I believe our organization devotes more resources to researching the financial aspect of the media than any company in the world.

Although S. 1277 embraces several areas of broadcast regulation, I would like to concentrate my prepared remarks on the anti-trafficking issue—that controversy which some interests believe endangers the public interest. They contend that the absence of a minimum holding period for station ownership has attracted so-called "fast-buck artists" to the broadcasting field, and that a holding period should be reinstated lest the public airwaves deteriorate into nothing more than commodities. I

believe these interests are at best misinformed and could dangerously mislead this Senate into passing legislation that would have precisely the opposite effect of that which it intends. Proponents of anti-trafficking have a vivid imagination and have played to emotions in defiance of facts.

In my view, the absence of a mandatory holding period since 1983 has, in part, contributed to an increase in the sale of radio and TV stations. But rather than harm the public interest, the turnover of ownership in the broadcast industry works to serve the public interest. It has provided the promise of change and the dynamic of hope that deregulation was meant to deliver. It has helped to unshackle broadcasting from artificial restraints and has thus encouraged vast new investment in the industry. It has encouraged and permitted professional broadcasters, a number of whom formerly only worked in the industry, to own and direct a part of the industry. Even station owners, who have been approved to hold licenses many times, are displaying a refreshing new aggressiveness. For the first time in decades, they are being permitted to plow their profits back into their own business, instead of being forced, by government fiat, to diversify. You are seeing a renaissance in broadcasting, and you are being asked to stay Michelangelo's hand. The fact is that the fearsome "fast-buck artists," whoever they are, are far outnumbered by those with a longer-term vision.

Consider these incontrovertible facts: Our studies show that during the past 4½ years, 6% of all the radio stations sold accounted for 40% of all the money spent to buy radio stations. And these dollars were all invested by veteran media executives. In the higher-profile TV sector, 26% of all the station sales acccounted for 81% of all the sales dollars. And all of these transactions involved media veterans. We are hard pressed to identify the "fast-buck artists" allegedly sweeping through this industry.

We maintain a database of the largest TV station sales in history. It shows that of the 25 largest sales in terms of dollar value, all but one occurred since 1983. These transactions involved a total of 90 stations, but fully 24 of these stations were duplicated sales as one company resold a station to another. Surely one would think this would be a fertile field for the "fast-buck artists." So let's see who the buyers were in these transactions:

1. A. H. Belo of Dallas, TX, publisher of the leading newspaper there.
2. Sumner Redstone, and influential media executive.
3. Capital Cities Communications, one of the finest station operators in industry history.
4. Veteran station owners George Gillett, the Outlet Corporation, Tribune Company, Gannett, the Cox family, the Hearst organization, Multimedia and General Electric.
5. Such newcomers to station ownership as the Walt Disney Company, MCA, Hallmark Cards and Rupert Murdoch, already well established in other media and obviously in the game for the long run.

That's everyone on the list, with the exception of FMI Financial, Kohlberg Kravis Roberts and E.M. Warburg Pincus. Because of the financial background of these investors, perhaps some people feel that they are more interested in money than broadcasting. Yet each of these entities has had considerable experience in managing assets of all kinds, and the people who provide them with capital are among the most prestigious institutions and individuals in the country. Warburg Pincus, for example, has long provided the media with the funding necessary to expand. And it has had the patience to wait for its investment return many times.

On the radio side, there are other names on the list of largest deals. Again, 24 of the 25 largest sales in radio history have occurred since 1983, involving 188 stations, of which 31 were double-counted because of resales to third parties. Again, we scanned the lists of buyers to look for evidence of the commodities traders threatening the industry.

Besides some of the names already mentioned, we found on the list such veteran radio companies as Sconnix, Infinity, Malrite, EZ, DKM, Keymarket and Park. We found newer companies run by serious broadcasters, such as Fairfield and Emmis. And we found three cases of station managements forming companies to buy their operations from larger companies—Carl Brazell from Metromedia, Gary Edens from Harte-Hanks and Dick Ferguson from Katz. There are no other names on the list.

If the names of people and companies that I have just recited are the "fast-buck artists" we've heard about, then surely Imagination has replaced Reason. Now let's go from names to numbers. My own company's data has been cited in this controversy as proving that station owners are on a buy-sell rampage, selling their souls willy-nilly for the sake of a dollar. Or, more accurately, for millions of dollars. But

the refuge of raw data can be the wrong place to hide if you're running from Reason.

We show, for example, the total number of stations that have sold in recent years, and yet many of these were sold in groups to single companies. And sometimes resold as part of a multi-faceted financing. Often, the management of the station doesn't change. Virtually all of these groups were sold voluntarily by their owners and often were sold to themselves or to their own managements.

Here's a fact: There have been only three sales of major broadcast groups that can be said to have been inspired by direct hostile approaches. In the first case, the stockholders of Storer Communications voted to put four of the alleged raiders on the board and the incumbent directors voluntarily sold the company, maintaining a position for themselves in the new company. In the second case, John Blair sold itself to Reliance to outbid an unsolicited tender offer. In the third case, Viacom was "taken over"—if that's the term you would use—by a man—Sumner Redstone—who was already its largest shareholder. It would be a tragedy, in a proud but overzealous attempt to protect the public, to establish a system that would entrench the management of a corporation against the wishes of those who actually own it.

Shifting from specific people and companies to a broader scope, it might surprise you that the absence of a holding period has attracted so few speculators. Why, for instance, have so many TV and radio stations been purchased in the last 4½ years by dependable, public-spirited, veteran broadcast companies? Why weren't they shouldered out of the way by more aggressive players with open wallets and closed minds? Much is made of the fact that Ivan Boesky turned over a TV station for a quick profit. But he was one man and that was one station. There are nearly 10,000 stations in the United States.

Saul Steinberg, known as a corporate raider, did not raid John Blair—he was invited to buy it. He is, moreover, developing a TV station group for the Hispanic Community. Kohlberg Kravis Roberts, deprecated by some as a corporate liquidator, didn't raid Storer—it was invited in. Only one other company bid for its assets, and that was a cable TV company. No broadcaster wanted to pay the stockholders more than $87 a share for Storer, despite the knowledge that it could be worth much more than that. KKR can hardly be vilified for having more faith in the value of Storer's assets than anyone else in the industry had.

The reason we have not seen a wave of hostile attacks and significant in-and-out trading is that broadcast stations are not commodities and the speculators know it. They know they need station management to keep profits flowing. And they know they need the viewer and listener population to keep the ratings going. The majority of stations are bought by professional station operators because they know the values best and they can raise the financing best. It is naive to think that a business as complex as competitive media can be transacted as easily as a commodities trade. It should be obvious that despite the changes in the rules, and the availability of inexpensive money, virtually all the leading TV and radio stations today remain in the hands of responsible, talented and public-serving broadcasters.

From a financial standpoint, the single most important reason for the rapid turnover of stations in recent years is the availability of huge pools of capital at a reasonable cost. You could have taken off the trafficking rule 10 times over and nothing would have happened if interest rates had remained in the 15-20% range, as they had been just prior to the removal of the holding period. The low cost of money that has prevailed since 1983-84 coincided with the end of a long stagnation of incumbent managements which was itself induced in part by restrictive regulation and in part by the habits of long-term entrenchment. One reason you are seeing higher values for stations is that during this period of restriction the market was precluded from recognizing their true economic value.

Should we legislate in the broadcast industry because the management of Cox Communications, which owned less than 50% of its stock, bought out the public? That resulted in 19 station turnovers in 1985. Should we penalize the broadcast industry because Leonard Goldenson had never bought the controlling stock of ABC, and thus delivered the company to Capital Cities before someone else accumulated the shares? That deal resulted in 25 station turnovers in 1985 and 1986.

Should we be concerned that Gulf Broadcasting sold its stations to Taft—a responsible broadcaster—which resold some of them to CBS—another veteran of the wars? Does the acquisition of stations by formerly restricted companies make them "fast-buck artists" overnight? Are we not in danger in this great innovative country of ours when we begin passing laws that go backwards? Are we that afraid of change? Was the old way so good and is the new one so terrible that we must mobilize the forces of Congress to exorcise fabricated demons?

I would implore this Subcommittee, the Senate and the Congress to turn their Imagination to the real facts in this controversy. Broadcasting is a business run by managements that understand its relationship to the people. To damn the many in this field for the faults of a few seems hardly to be in the public interest. American television and radio always have been, and continue to be the world's most admirable system of public communication, information and entertainment. It has not changed since the trafficking rule came off, and it is not likely to change if it remains off. That's because it is a business in which the public ultimately determines what happens. Congress saw to that in 1934 and the Federal Communications Commission, under the aegis of Congress, has policed the system since. Let's not fix what ain't broke.

The artist Francisco Jose de Goya wrote an inscription for one of his paintings nearly 200 years ago that we might remember today, as we consider possible flights of Imagination. "Imagination," he said, "abandoned by Reason produces impossible monsters. United with her, she is the mother of the arts and the source of their wonders." I'm all for motherhood. I hope you are, too.

Thank you again for the opportunity to speak; I'll be happy to answer any questions you may have.

Senator EXON. Thank you, Mr. Kagan.

In the interest of time and because of the time pressures of the Chairman, I would like now to go on down the panel, and I would like to ask each of you, if you possibly could, to hold your comments to no more than three minutes so we can get everybody in because of the time restraints.

Ms. Charren, welcome to you.

STATEMENT OF PEGGY CHARREN, PRESIDENT, ACTION FOR CHILDREN'S TELEVISION

Ms. CHARREN. It is nice to be here. I feel like the 1970s are happening all over again.

I am Peggy Charren and I am president of Action for Children's Television, a national organization that is dedicated to promoting worthwhile children's TV programming and sound commercial practices in such programs. And I appreciate the opportunity to talk to you this morning.

I want to commend you on the introduction of this legislation because it promotes children's programming. That single word "children" in section 101 is very important to us and to everybody that supports what ACT has been doing because we do not believe that the marketplace takes care of children without the words appearing in legislation. It is not enough. Like Oliver Twist, we want more, but it is better than nothing.

The history of what has been going on in this issue we think speaks to the need for the legislation to recognize children as a separate place to serve the public. In 1974 the FCC adopted a policy statement which found that broadcast licensees had an affirmative duty to serve children in specific ways, including a reasonable amount of age specific and informational educational programming, but this FCC has abandoned children. It eliminated the 1974 requirements and the current state of children's television programming reflects the FCC's disinterested attitude.

The worst effects of its new stance can been seen in the commercialization of children's television. In fact, on June 13, the lead story in TV Guide was titled "Creeping Commercialism: Is the Toy Business Taking over Kid Vid?" And I would like to, if possible, enter that in the record in the interests of time.

Senator EXON. Thank you.

Ms. CHARREN. Program-length commercials now dominate programming. It is a reversal of former Commission policy. With its new TV policies, the Commission did not give away the store. It gave kid vid to the store, the toy store. We thought when we started ACT way back in 1968 that if the industry needed inspiration, it could go to bookshelves. What it did was go to the wrong set of shelves, the toy shelves.

Interactive television which is wholly driven by a marketed toy is the newest trend and one which the Commission has shown no indication of stopping. In fact, the Commission in letters to the toy companies involved gave permission to the practice.

The FCC removed its limits on commercial advertisements on children's TV without thought despite the fact that the fundamental premise of its policy has not changed. Children are different from adults, and the marketplace will not function to serve children.

The recent court opinion in the case where we sued the FCC for overturning its long-standing policies against over-commercialization without setting a record or asking any questions—our position was just reaffirmed by the U.S. Court of Appeals in a very interesting opinion which we think is going to maybe help turn this around.

Proof that when the Commission says children are important as clear as possible it works in the marketplace is the way programming worked in the 1970s. CBS had 20 people in their news department doing alternative programming for children, and when the Reagan FCC said we do not care what you do for children, in effect, the 20 people were fired and all that alternative information programming disappeared.

We think if children's television is to be improved, it is up to Congress to do so and we stress that more than S. 1277 is needed, but it is a good first step.

[The statement and questions follow:]

STATEMENT OF PEGGY CHARREN, PRESIDENT, ACTION FOR CHILDREN'S TELEVISION

Good morning. My name is Peggy Charren and I am the president of Action for Children's Television, a national organization dedicated to promoting worthwhile children's television programming and sound commercial practices in such programming. Thank you for the opportunity to present my views to you this morning on S. 1277.

First, let me commend you on the introduction of this legislation. Not only does it promote the important area of nonentertainment programming, but Section 101 singles out one category as especially worthwhile—children's programming. This is a most critical provision and we stress to you, the *least* that can be done in this area. Like Oliver Twist, we want more; this gruel is thin indeed.

Let me briefly lay out for you the background in this area. In 1974, the Federal Communications Commission adopted its *Children's Television Policy Statement* where it found that broadcast licensees had an affirmative duty to serve the unique needs of America's child audience. The Commission found that broadcasters must air a "reasonable amount" of programming for children, programming which is age-specific. A four-year old, who cannot read, differs markedly in maturity and outlook from an eleven-year old. Broadcasters were required to recognize this difference and target its programming accordingly. Children's programming was required to inform and educate rather than solely entertain. Entertainment programming for children was of course acceptable, but broadcasters had a duty to also present a reasonable amount of educational and informational programming.

The Commission's 1974 action was based on a simple and compelling premise. Broadcast licensees are public trustees—fiduciaries for the general public. If they

are not required to act as trustees for our nation's children—our most important national resource—then to whom are they obligated to serve? We are all familiar with the statistics. Young children watch on average 27 hours a week of television—more time than they spend in school by the time they finish high school. By the time the average child reaches 18, no single activity besides sleep will occupy as much of his time.

Yet, children's television programming today is in a sorry state. The Fowler FCC has gutted most of the basic children's television policy. In 1983, Chairman Fowler said in a speech to the Arizona State Broadcasters Association that broadcasters would not be held responsible at renewal for a failure to serve the needs of children. In 1984, the Commission as a whole issued its *Report on Children's Television Programming and Advertising Practices* which did reaffirm that the child audience was unique and must be served but which at the same time basically gutted the 1974 *Policy Statement*. The Commission eliminated the requirement that programming be age-specific and the requirement that programming be educational and informational. As long as the broadcaster presents any "quality" entertainment programming which attracts a significant child audience, even a program directed to adults, it could meet its duty said the FCC. This action, together with Chairman Fowler's speech, gave the broadcast community one message, loud and clear: "The lid is off."

This Committee should be aware of one area in particular which is threatening to undermine the foundation of all children's programming—commercialization. In this area, the FCC has completely ignored the past and opened up the Pandora's Box of outright commercialism. In 1969, the Commission decided a case called *Hot Wheels* where it found that the Hot Wheels television show was nothing more than a program-length commercial designed to promote the sale of Hot Wheels toys and was therefore not acceptable program fare. The Commission has now reversed that decision.

What controls now is Gresham's law. Toys drive programming. At last count, there were 75 programs which are product-based. For example, some of the most popular programs which are based on toys are *Gobots, ThunderCats, Transformers, G.I. Joe,* and *Care Bears*. From the financial aspect—cost of programming, assurance of strong commercial sponsorship—these product-programs have obvious advantages over those not produced by toy manufacturers and they are therefore more likely to be aired. In a recent report on this misguided trend, *Newsweek* magazine stated: "[T]he creative order of things has been reversed. Instead of deriving the product from the program, toymakers and animation houses now build entire kidvid shows around planned or existing playthings. The programs can become, in effect, little more than half-hour commercials for their toy casts." May 13, 1985 at 85.

Even broadcasters recognize this type of children's programming for what it is. Rupert Murdoch, in a recent interview, commented: "There't nothing wrong with advertising to a child audience, but to make your programming that way I think is really a prostitution of the broadcasters' function. If you did that in a newspaper, you'd be run out of town. Or in a magazine." *Broadcasting,* April 13, 1987, at 60. This country's broadcasters and the Federal Communications Commission should be ashamed of themselves for exploiting children in this fashion—the state of children's television is a national scandal.

There do not appear to be any signs that things will improve at the Commission either, at least without positive action by the Congress or the Courts. The newest trend is interactive television. Through inaudible signals inserted into television shows, child viewers will be able to "interact" with a television program if they purchase a special toy (which can cost as much as $250) capable of picking up the signal. The whole thrust of the program is its interaction via the toy and the whole thrust of the toy is its use with the program. The greater the sales of the toy, the more successful the program. In February, ACT filed with the FCC a petition seeking a declaratory ruling that these shows violate the public interest and asking, at the least, that the Commission open an immediate inquiry on the serious issues raised by this newest form of program-length commercials. ACT told the Commission that children are not capable of understanding that what they are really watching is a pitch for the required interactive toy and that the programming thus takes unfair advantage of its child audience. Our concern has fallen on deaf ears. No action has been taken on that petition and plans for the programs are moving forward.

The Commission has also taken off the limits it previously had on the acceptable amount of commercial advertisements during children's programming—9½ minutes per hour during children's prime time (Saturdays and Sundays) and 12 minutes during the week. The Commission, after initially giving no explanation, finally offered two specious reasons for this move. First, it said it was deemphasizing quanti-

tative guidelines generally and second, the FCC noted that advertising is an important support mechanism for children's television programming. The U.S. Court of Appeals reversed the FCC, finding the adoption of "what had heretofore been an unthinkable bureaucratic conclusion" arbitrary and capricious.

The Court noted that for 15 years, "the FCC's regulation of children's television was founded on the premise that the television marketplace *does not* function adequately when children make up the audience." Children cannot comprehend conceptually the difference between programming and advertising. Because of their youth and inexperience children are "far more trusting of and vulnerable to commercial 'pitches' than are adults." The Commission itself so found in its 1974 Report. The Court reminded the Commission of the fact that "kids are different; the Commission cannot cavalierly revoke its special policy for youngsters without reexamining its earlier conclusions."

Even now, the Commission maintains policies which are premised on the basic notion that children are unique and not subject to regulation by the marketplace. Its ban on hostselling (television commercials which feature the same primary characters as those in the adjacent program) and the requirement of strict separation between advertising and program content exist because of the recognition that the market will not work for kids. How, under these circumstances, can the Commission permit half-hour long programs which are nothing more than commercials designed to promote toy sales? Why are these programs different when there clearly is no separation of programming from commercial? The short answer is that the Commission has turned its back on our nation's children, whatever the consequences. It is now left to Congress to address the situation if we are to improve the state of children's television.

In conclusion, ACT commends the effort made in S. 1277 but stresses that this is just a first step. More is needed, especially in light of the sorry state children's television is now in. We ask that you consider legislation such as S. 1594, which was introduced in the 99th Congress. The Commission has clearly forgotten that child by child we build our future.

Thank you.

QUESTIONS OF SENATOR INOUYE AND THE ANSWERS

Question 1. Ms. Charren, many opponents of this legislation contend that the term "meritorious" is too vague and will cause confusion. How would you define meritorious programming directed towards children?

Answer 1. I agree that the term, "meritorious", while the proper standard, needs fleshing out. In my view, such fleshing out should be along the lines of S. 1594 in the 99th Congress.

Question 2. Ms. Charren, if a particular station determined that it was not going to direct any of its programming towards children, say it only wanted to broadcast news and felt that other stations in the market broadcast sufficient children's programming, do you believe that that station should not be entitled to have its license renewed?

Answer 2. My focus at ACT is upon television, and I believe that so also should your legislative focus. Radio, with its thousands of stations (e.g., 59 in Chicago, 39 in Washington), can and should specialize, such as the all-news stations in your example (although even then there surely can be appropriate segments dealing with matters affecting children). Television, however, stands on a different footing as to children's programming. The FCC, in both its 1974 and 1985 reports, correctly stressed that each TV licensee has a duty to serve the unique child audience. Thus, even if a TV station specialized (and few do today), it would have a continuing duty to serve the child audience in a way appropriate to its specialization (e.g., Spanish language; black-oriented). I would therefore strongly urge that no TV stations be renewed that failed in this most important responsibility.

Senator EXON. Thank you, Ms. Charren.

Mr. Pattiz? Do I pronounce your name correctly?

Mr. PATTIZ. Absolutely right.

STATEMENT OF NORMAN PATTIZ, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, WESTWOOD ONE

Mr. PATTIZ. Thank you, Mr. Chairman. I am the founder, chairman and chief executive of Westwood One, which is the Nation's

largest producer and distributor of syndicated radio programs. We also own the Mutual Broadcasting System, which is right across the river in Arlington, Virginia. Mutual is the single largest individual radio network, with about 860 affiliates across the country.

We do not own radio stations. We do, however, interact heavily with radio stations. And we are not a company that is involved in any broadcast businesses other than radio. So, I will be speaking to this legislation strictly as it relates to the radio business.

We strongly support the provisions of S. 1277 that would preserve the duopoly and one-to-a-market rules.

I might mention that when I started this enterprise 12 or 13 years ago, I learned right away that there were opportunities for entrepreneurial ventures in the radio business that were not available in a lot of other businesses, and we could fill the needs of broadcasters—which was not inconsistent at all with fulfilling the needs of the local communities that they serve.

One of the reasons that we were intrigued with this business from the very beginning was we felt that there were no major players. Because of the way radio was regulated at the time, with the 7-7-7 rules, and the duopoly and one to a market rules, there was no way that any of the big boys were going to be able to come down and influence radio stations to carry or not carry our programs.

When the 7-7-7 rule became the 12, 12 and 12 rule, we started to get a little bit more nervous. And now that the FCC has asked for comments on one-to-a-market and duopoly, there is generally a feeling afoot that something is going to change. In conversations that I have had with staff up here and also with various commissioners at the FCC, it is clear to me that if the FCC is allowed to do what the FCC wants to do, we are going to see further and further and further de-regulation. In terms of the diversity and quality of programming that I think we all seek, deregulation of the duopoly and one-to-a-market rules would have a disastrous effect on the marketplace.

The fact of the matter, and the one point that I want to make before I end my comments, is that traditional radio networks that own radio stations have a tremendous advantage over radio networks and other companies that do not own radio stations. And to the extent that these traditional networks can increase the amount of radio stations that they own, they can mandate distribution of commercial announcements which is, after all, the source of the support for all of our networks.

And the thing that concerns me is that if there are less and less limits on the ownership of radio stations that are owned by networks and owned by single companies, it will be more and more difficult for independent broadcasters and independent companies, which seem to me to be of paramount interest in providing diversity and quality programming and differing opinions. It will become more and more difficult for us to find and supply those independent broadcasters—to have outlets for that diversity. It is, after all, fairly unusual for ABC to allow Mutual to affiliate its radio stations.

I would be happy to deal with anything further in questions if you feel it appropriate.

[The statement and questions follow:]

STATEMENT OF NORMAN PATTIZ

Mr. Chairman and members of the Subcommittee, I am pleased to have the opportunity to testify this morning concerning S. 1277, the "Broadcasting Improvements Act of 1987." In particular, I am encouraged by the fact that this legislation promises to bring a halt to the Federal communication Commission's wrongheaded and foolhardy proposals to relax the duopoly and one-to-a-market rules, the rules that limit concentration of ownership of broadcast outlets.[1]

These proposals do nothing to advance the public interest and threaten significant harm to the diversity of views and programming that the duopoly and one-to-a-market rules make possible. By turning independent stations into captive markets for programming dictated by corporate owners often far removed from the communities they serve, frequently with business interests that have little to nothing to do with radio, these proposals threaten to set loose a headlong slide to mediocrity in radio programming. It has to be stopped, and I am very pleased to see that you are prepared to stop it.

I am the Chairman and Chief Executive Officer of Westwood One, a company that I founded some thirteen years ago that has grown to become the largest syndicator of radio programming in the nation and the owner of the Mutual Broadcasting System.

Westwood One owns no radio stations. We provide entertainment, news, and public affairs programming to radio stations across the United States who buy our services because we provide first rate programs. No one buys our programming because he has to. The decision to accept or reject our programming is made by independent stations in response to local interests and needs. We have no captive markets. We succeed because we serve the public's interest in quality programming, not because we own or control major broadcast facilities in major markets.

In my view, that is the way it should be. The duopoly and one-to-a-market rules serve the public interest by ensuring the diversity of ownership and independence that makes diverse programming possible. Consolidating ownership stifles the independence that is now the hallmark of the radio industry, without advancing the public interest. And that's wrong.

The FCC and proponents of the FCC's proposal argue that relaxing the duopoly and one-to-a-market rules (1) will not have an adverse effect on diversity, and, (2) will actually have a positive impact on diversity and the quality of broadcast programming. Both of these arguments are specious. In my view, the changes in the duopoly and one-to-a-market rules would only benefit those who seek to own multiple media outlets. I see no public benefit from increased concentration of ownership in the broadcast field.

The FCC's proposal abandons the principle that has guided broadcast regulations for the past fifty years—that diverse ownership of broadcast outlets will foster diversity of programming and viewpoint.[2] As you know, the multiple ownership rules were designed to promote programming and viewpoint diversity by encouraging diverse ownership of broadcast outlets.[3] Although the airline and trucking industries have been deregulated with some measure of success in recent years, the plain and simple fact is that the broadcast industry is fundamentally different from the airline and trucking industries—if for no other reason than the fact that broadcasting provides a forum for the exercise of a constitutional right. For this reason, Congress placed the airwaves under the exclusive stewardship of the federal government.[4]

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[1] *See* Proposed Amendment of the Broadcast Multiple Ownership Rules summarized in 52 Fed. Reg. 8066 (1987) (hereafter "Notice").

[2] This assumption is reflected throughout the Communications Act of 1934, *see, e.g.* 47 U.S.C §§ 309(i)(3)(a), 392(f), 396(a) and (g)(1), 532(a), and 533, and has been strongly endorsed over the years by the FCC, *see, e.g., Second Report and Order* in Docket No. 18110, 50 FCC2d 1046, 1050 (1975), recon. granted in part, 53 FCC2d 589 (1975), *aff'd sub nom.*, FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978); the Congress, *see. e.g.*, H.R. Rep. 934, 98th Cong. 2d Sess. 31-32 (1984); and the courts, *see, e.g.*, Red Lion Broadcasting v. FCC, 395 U.S. 367, 390 (1969); Associated Press v. U.S. 326 U.S. 1, 20 (1945).

[3] *See, Multiple Ownership of Standard, FM, and Television Broadcast Stations* 22 FCC2d 306, 314 (stating that "the operation of broadcast stations by a large group of diversified licensees will better serve the public interest than the operation of broadcast stations by a small and limited group . . . . [T]he fundamental purpose of this facet of the multiple ownership rules is to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest." *quoting" 18 FCC2d 291-92)*

[4] 47 U.S.C § 301.

The multiple ownership rules do not represent limitations on another economic market. Rather, they serve as protections for diversity in the marketplace of ideas guaranteed by the First Amendment.[5]

Nonetheless, the FCC would virtually abandon the multiple ownership rules in the misguided belief that blanket exceptions would have no adverse impact on diversity. Such a belief underestimates how easily diversity might deteriorate under a less protective regime. Blanket exceptions to the multiple ownership rules would allow multiple media outlets in one market to come under the control of a single owner, drastically reducing the number of viewpoints available to the public.

An example will illustrate the dangers of a blanket exception to the one-to-a-market rule.[6] A blanket exception would permit each owner of a television station in a viewing area to own at least one radio station in that same market. If each owner of a television station purchased one of the largest radio stations in an area, a reasonable likelihood, the impact on diversity would be dramatic. A city with three major television stations and three leading radio stations—a total of six separate viewpoints—might lose the three independent voices of its radio stations, gaining nothing more than a radio repetition of views already widely dispersed through the television outlets.

Anyone who doubts this has only to listen to the evening radio news broadcast churned out by the major television networks. All too often, these radio reports are nothing more than the audio portion of news reports later re-broadcast, with pictures, on television. This may serve the networks' bottom line, but it is stark evidence of the homogenization of views and programming that can be expected from consolidated ownership.

The effect of relaxing the one-to-a-market rule would be magnified by a blanket exception to the duopoly rule. Although the absolute number of stations available might remain the same, a large number of listeners would hear only a few voices. It is easy to envision that the proposed exceptions could lead to domination of the airwaves by a few speakers, in a way not possible if the current multiple ownership rules were maintained and enforced.

Wiping out the multiple ownership rules would further erode diversity because large media conglomerates would enjoy competitive advantages over independent stations. Radio stations live or die on their ability to attract advertising. In a competitive market, this economic incentive promotes high quality programming; advertisers seek excellent programming, because good programming attracts large audiences.

But in a consolidated market, owners of multiple broadcast properties are able to attract advertisers through the sheer quantity of broadcast outlets they offer—not through the quality of their programming. In this environment, programming cannot help but suffer because it becomes increasingly irrelevant. As the owners of multiple properties confiscate the advertising base of their competition by buying it outright, the markets for independent programmers dry up—and the opportunities for quality programming alternatives wither, reducing both the number of independent voices in the community as well as the incentives for entrepreneurs to produce high quality programs.

Although, in theory, the antitrust laws might slow such concentration of ownership, the antitrust laws were not designed to protect First Amendment interests; that is the FCC's role. And because First Amendment values are at risk, the FCC has historically sought to prevent even the potential for anticompetitive effects.[7] This standard, higher than the one imposed in purely economic arenas, takes greater care to protect competition in the broadcast market because significant constitutional harms could result from diminished competition.

Blanket exceptions to the multiple ownership rules would probably cut inroads into viewpoint diversity where this diversity most needs protection—in the area of minority ownership and local control over media outlets. Because the multiple ownership rules prevent national corporations from controlling multiple media outlets in a single market, opportunities exist for independent local and minority-owned stations. Notably, in direct contrast to the obvious effect of the FCC proposal, S. 1277 seeks to promote minority ownership by codifying a system of preferences and tax certificates. Mr. Chairman, this approach of fostering minority ownership and

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[5] *See* Abrams v. U.S., 250 U.S. 616, 630 (1919); Associated Press v. U.S., 326 U.S. 1, 20 (1945).

[6] The FCC suggested that it would consider a blanket exception from the duopoly and one-to-a-market rules for the largest markets. Capital Cities/ABC proposed a blanket exception for the fifty largest markets in the comment it submitted in response to the FCC's Notice. *See Comments of Capital Cities/ABC, Inc.*, (filed June 15, 1987).

[7] *See. e.g.*, 22 FCC2d at 314.

views rather than encouraging concentration of ownership is the appropriate direction for broadcast regulation.

The FCC also maintains that the proposed rules will promote the public welfare by enhancing competition and diversity and by allowing for higher quality programming and news gathering. Mr. Chairman, the proposed relaxation of the multiple ownership rules will not promote public welfare one iota. The only welfare that the rules change will promote is the private welfare of those who own multiple broadcasting outlets.

The FCC holds to the belief that owners of multiple broadcast outlets will invest more in news-gathering and programming because they are assured of customers for their products. Moreover, joint news-gathering and programming is beneficial, so the argument goes, because the economies of scope and scale produce a higher quality product; money saved through economies of scope and scale theoretically can be used to tailor broadcasts to specialized audiences, enhancing diversity of views and formats. I flatly reject these contentions. The supposed public benefits of joint ownership are spurious.

The FCC and those that support relaxation of the ownership rules assert that joint owners will make larger investments in news gathering and programming because they are assured of buyers for their product. There is no evidence to support this position and, frankly, it flatly contradicts everything we know about the way the marketplace works.

Westwood One has to produce quality programming to stay in business. We have no captive buyers. We know full well that any of our buyers can give us the heave-ho anytime we fail to provide programming that is responsive to the needs and interests of the market, or when somebody else in this business starts offering something better. None of these incentives is present for the corporation that owns its buyers.

The notion that joint ownership is important because it allows for joint news gathering and programming is similarly fatuous. Mr. Chairman, joint news-gathering and programming is my business, and I will tell you that an organization that provides quality news coverage and programming can be successful by selling its product to independently owned broadcast outlets. Joint ownership of broadcast outlets is not necessary for the public to enjoy the benefits of joint news-gathering and programming. As long as independently owned stations can contract with providers of joint news-gathering and programming, the advantages of joint news-gathering and programming are not a reason to relax the rules on multiple ownership.

To the contrary, there is a very strong reason to prefer contractual solutions over relaxation of multiple ownership rules: contractual solutions do not endanger diversity. When independent radio stations take advantage of the benefits of size by purchasing news or programming, they retain editorial discretion to pick and choose among various news stories and programs available on a national market. But when radio and television stations are jointly owned, the valuable independent voice usually audible in programming choice and editorial policy is silenced by decisions from a distant headquarters. Therefore, because contractual relationships provide all the benefits offered by multiple ownership without endangering diversity, arguments that multiple ownership is beneficial to the public interest should be regarded with suspicion.

As for the claim that joint ownership will enhance diversity by promoting well-tailored formats that are sensitive to local or specialized listening tastes, nothing could be further from the truth. Specialized or tailored formats work best when independent station owners create their own format by picking and choosing programming that is available from various sources, not when a corporate owner impresses and imposes its editorial viewpoint and programming on a local station.

Finally, in those isolated cases in which there is solid evidence that joint ownership will benefit the public, the FCC can provide exceptions to the multiple ownership rules. In essence, Mr. Chairman, my quarrel with the FCC's proposal to relax the multiple ownership rules is that the Commission has chosen a radical departure, a blanket exception from the duopoly and one-to-a-market rules, when a much less drastic approach, case-by-case exceptions, is available and would address the problems equally well.

I acknowledge that the multiple ownership rules should not be applied mechanically in every instance. There are assuredly cases in which an exemption from the multiple ownership rules would not harm diversity and might actually bring some benefit in programming.[8] In such instances, it is perfectly appropriate and desirable

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[8] For instance, multiple ownership rules should be waived if it is clear that a station would otherwise go out of business.

for the Commission to waive one of its multiple ownership rules. But such cases are few and far between.

Case-by-case review would give the Commission the ability to differentiate between the vast majority of situations in which multiple ownership would harm diversity and those few instances in which more concentrated ownership would not implicate the basic First Amendment concerns that are the cornerstone of broadcast regulation. In contrast, a blanket exception would allow concentration of ownership without any assurance that the consolidation in question would be in the public interest.[9] In most cases, I believe consolidation would not be in the public interest. Quite simply, Mr. Chairman, the First Amendment mandate of programming and viewpoint diversity is far too critical an objective to sacrifice for the administrative convenience of a simple blanket exception.[10]

Let me address one final point with respect to the proposed changes to the multiple ownership rules. The FCC and those who support the relaxation of the multiple ownership rules suggest that these changes would benefit AM radio. Mr. Chairman, I doubt that there is anyone in the country who is more committed to the revival of AM radio than I. It is a great resource that is wasting away. But relaxation of the multiple ownership rules is not even a partial prescription for the ills that plague AM radio.

The solution to the problems of AM radio is economic growth. Ten years ago, many industry analysts thought that radio networks would go the way of the dinosaurs. Radio networks were not saved by changes in the regulatory environment or philosophy. Rather, programming entrepreneurs armed with inventive and vigorous ideas spurred the economic revival of radio networks. The same can and will happen in AM radio.

The FCC does have a useful role in fostering the resurgence of AM radio, and one that will not undermine the diversity protected and preserved by the multiple ownership rules. AM radio is being stifled by a technological logjam over high-quality AM receivers and the unavailability of AM stereo. If the FCC wants to help AM radio, and I believe that is an appropriate role for the Commission, it should directly address the technological issues that are holding back the economic growth crucial to AM radio's return to prominence and profitability.[11] Altering the multiple ownership rules would have only the most minor impact on AM radio, and this small and speculative benefit hardly warrants the otherwise unsupportable and detrimental rule changes proposed by the Commission.

In summary, Mr. Chairman, the action the FCC is contemplating with respect to the duopoly and one-to-a-market rules would be a grave mistake. It would dramati-

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[9] Two recent FCC decisions provide a telling indication that blanket relaxation of multiple ownership rules would not serve the public interest in all cases. RCA Corp. (GE Merger) 60 R.R.2d 563 (1986); Capital Cities Communications, Inc., 59 R.R.2d 451 (1985). Both cases involved station holdings that would be allowed under the proposed blanket relaxation of the multiple ownership rules, but which the Commission found not to be in the public interest when an exception from the rules was sought.

[10] While I strongly support the provisions of S. 1277 that preserve the duopoly and one-to-a-market rules, I am very troubled by the section of the legislation that would reinstitute the anti-trafficking rule, the so-called three-year rule. I believe that repeal of the three-year rule has played a crucial part in opening up capital markets to the broadcast industry and bringing needed resources into broadcasting.

Many people dislike the three-year rules because they think it brings investors into the radio business who care only about profit and not about radio. They think that investors seeking to make the highest profit from radio will cut budgets for news and public affairs programming, to the detriment of the listening public. The solution to this problem is not to reinstitute the three-year rule. If Congress thinks that a certain measure of news and public affairs programming is essential to the public interest, it should reimpose direct requirements for news and public affairs programming. Attempting to address the problem by reinstituting the three-year rule would needlessly deprive the radio industry of much needed resources without insuring that radio stations air news and public affairs programs.

The worst possible scenario is reinstitution of the three-year rule and blanket exceptions to the duopoly and one-to-a-market rules. The three-year rule would dry up capital markets. Blanket exceptions to the duopoly and one-to-a-market rules would mean that media conglomerates can purchase numerous broadcast properties. In combination, these rules changes would not only allow media conglomerates to purchase numerous stations, but would have those owners become entrenched because of the operation of the three-year rule. The result will be that entrepreneurs will be frozen out of the market depriving the broadcast industry of needed new blood.

[11] In February of this year, the National Telecommunications and Information Administration within the Department of Commerce issued a report called *AM Stereo And The Future Of AM Radio.* This report recommended a variety of actions to assist AM radio. Notably, none of the recommendations suggested that a change in the multiple ownership rules would offer any significant benefit to AM radio.

cally alter a historically successful regulatory policy, when a far less draconian response would produce the desired public benefit.[12] If the multiple ownership rules occasionally produce an anomalous result, the prudent course is to provide for case-by-case exceptions to the rules, not to abandon the rules as the FCC proposes.

I applaud this Committee's vigilance over an FCC that seems more interested in implementing a political philosophy than carrying out its function in protecting First Amendment interests. I enthusiastically support those provisions of S. 1277 that address the multiple ownership rules, and I thank the Committee for the opportunity to present my views.

QUESTIONS OF SENATOR INOUYE AND THE ANSWERS

Question 1. Mr. Pattiz, are there efficiencies to owning more than one station in a market?

Answer. Efficiencies are certainly possible, but these efficiencies come at the expense of the diversity and independence that are and always have been the distinguishing feature of the radio market. It is important to keep in mind that joint ownership is not the only way for radio stations to achieve efficiencies. Programming networks such as Westwood One and Mutual provide stations with quality news and entertainment programming that no small stations or group of stations could provide alone, and we do so without owning a single radio station.

Joint ownership makes certain management efficiences possible, but there is no guarantee that stations will be better managed simply because they are jointly owned with other broadcast properties, and there is certainly no guarantee that any efficiencies that result from joint ownership will work to the benefit of the public. The only thing we are guaranteed by abandoning the duopoly and one-to-a-market rule is less diversity and independence in the market.

It is worth noting that the staff of the Federal Trade Commission, in comments before the FCC supporting relaxation of the common ownership rules, demurred on the impact of common ownership on diversity in editorial viewpoints, calling it a matter "beyond our institutional expertise." But the impact of common ownership on editorial diversity cannot be so lightly ignored. Indeed, it's the single most important issue in this debate. Whatever efficiencies may be claimed for common ownership, they cannot make up for the loss of editorial diversity that is certain to follow if the duopoly and one-to-a-market rules are abandoned.

Question 2. Mr. Pattiz, I realize that frequently owners of more than one station in a particular market may program those stations to reach different audiences because of the competition. But doesn't common ownership increase the likelihood that there will be a reduction in program diversity?

Answer. Absolutely. Abandoning the one-to-a-market and duopoly rules guarantees a reduction in the number of voices in the marketplace. It should be self-evident that ten stations owned and operated by ten owners yield greater diversity than ten stations owned by five owners, regardless of the programing decisions made by the owners. Even if stations are programmed to reach different audiences, they will probably share certain critical aspects of their programming. Such as news or public affairs programming, and it is fair to assume that the only editorial viewpoint expressed on these stations will be the viewpoint of the joint owner. Furthermore, it is important to keep in mind that a station's editorial viewpoint is not limited to news and public affairs programming. Even music programming reflects the editorial judgments of the station's ownership. A superficial diversity in programming may mask the fact that certain kinds of music or certain artists never get played, certain news events never get covered, and certain political views never find their way on the air. The chances for views to be stifled or ignored increase with the consolidation of broadcast ownership in a few hands.

Question 3. Could the relaxation of the multiple ownership rules make it more difficult for stand-along stations?

Answer. "More difficult" puts it mildly. I think stand-alone stations could go the way of the corner grocery if chains are allowed to gobble up stations in local markets.

For better or worse, advertising is what makes radio possible. There is simply no way for a stand-alone station to compete for long with somebody who can guarantee

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[12] It is rumored that the FCC would like to relax or repeal other multiple ownership rules if the proposal with respect to the duopoly and one-to-a-market rules is accepted. The problems with multiple ownership will only get worse if other multiple ownership rules—particularly the 12-12-12 rule—are abandoned.

an advertiser key placements in multiple stations because that somebody owns the stations. Moreover, as network ownership is allowed to grow, it becomes more and more difficult for companies like Westwood One to secure outlets for independent programming. As I noted in my testimony before the Committee, the network-owned stations have never been terribly interested in Westwood's One's product. As the number of available outlets shrinks, we lose the ability to offer the advertising base that provides the revenues that make it possible for us to provide first class programming. Indeed, we would likely be forced to buy stations, as a defensive measure, in order to maintain our advertising base, and other programming networks would be forced to do the same. In short order, we can expect to find fewer and fewer firms providing programming to stand-alone stations. That means diminished opportunities for the stand-alone firm to augment its local programming at a time when its advertising base, and the revenues that make strong local programming possible, is under attack from multiple outlet competition. In these circumstances, the stand-alone firm will be well advised to become part of a multiple outlet operation in order to stay in business, further diminishing diversity of views in the marketplace.

Senator EXON. Just let me say that I think you brought up a good point. As I indicated earlier, I have been for as much deregulation of the broadcast industry as possible because I think over the years we have built up a lot of archaic rules, especially with regard to re-licensing and so forth. I was not enthused when we went over to the 7-7. I am not for going anywhere beyond 12-12 because I think while that might be very good for those who presently own broadcasting stations and licenses, I am not sure that it is good for the overall service to the general public to have more and more of our limited broadcasting media despite the fact that it is proliferating very rapidly to fall into the same hands. And I share your concern.

Mr. Marshall?

STATEMENT OF PLURIA MARSHALL, CHAIRMAN, NATIONAL BLACK MEDIA COALITION

Mr. MARSHALL. Thank you, sir. I appreciate the opportunity to come before you today.

We at the National Black Media Coalition have been in this struggle to try and maintain some responsibility in the broadcasters' hands. And after deregulation, we felt that much of this had been dealt a very severe blow. We think that radio has been turned loose completely, and in the black community it is a very special problem because all of the radio stations point to the "black formatted station' as the stations who are supposed to serve you. And many of these stations have simply not provided anything but music.

And I think that we do have special news needs that are not necessarily being met by the news stations. They have very little "integrated news.' It is a repeat of what happens in the newspapers a lot of times.

We think that this bill does begin to address broadcasters' responsibility in a very sane way. I do not know why they have gone after so many rules that made them so much money for so long. If it ain't broke, don't fix it. But somehow they felt the need to do this.

I think that the Congress should require the FCC to increase utilization of its minority preference policies, its tax certificate policies, and maybe they will start again to use the distress sale policy

because since the Reagan Administration has been in and the FCC people have begun to reflect those views, we have had almost no distress sales in six years. So, those policies are not even being used for the most part.

I think that we are a long ways away from parity in ownership and minority ownership needs to get—it needs to be strengthened rather than have these folks talking about eliminating the minority policies. We think that the provisions in the bill that gives automatic renewal should be eliminated. We think broadcasters should be held to some levels of responsibility and accountability rather than just getting automatic renewals with this two-step thing. It really has to be looked at very carefully.

The other part where public interest groups are refrained from getting any financial compensation out of agreements—I think that is basically an interference with free enterprise. I mean, you are telling the broadcaster who they can and cannot do business with. Many of the deals that we have been involved with—at points we have been responsible for pulling the deal through the Commission. The deal would not have even gotten out of it. Yet, you are telling that company that we can't be compensated for helping them get that deal through.

And I think that the idea of making sure that the marketplace in this instance is left alone—you know, you talk about other instances where you want to do pretty well as you please. But then there are some folks that you want to punish because you want them to come under some other rules. We would like for you to remain consistent with the rules and take those two provisions out of the bill.

Thank you very much.

[The statement follows:]

STATEMENT OF PLURIA W. MARSHALL, CHAIRMAN, NATIONAL BLACK MEDIA COALITION

Mr. Chairman: I am Pluria Marshall, Chairman, National Black Media Coalition (NBMC). I appreciate the opportunity to address the communications subcommittee today on the issue of deregulation.

As chairman, I come before this distinguished committee representing the NBMC and its 85 affiliates throughout the United States. Today under my leadership, NBMC has gained the experience, strength and credibility to negotiate as equals across the table with the largest media corporations in the United States, that include: Evening News Association, Post-Newsweek Stations, Post Corporation, Ziff-Davis Broadcasting, General Electric, Albritton Communications, Turner Broadcasting, Gannett Company, Inc., etc.

Our mission is to (1) provide equal employment opportunities for blacks at every level of the industry, particularly decision-making positions; (2) to provide quality programming in the public interest; and (3) to increase ownership of broadcast properties by black entrepreneurs.

NBMC provides ongoing programs and services that monitor and help blacks in the broadcast industry. It is the most successful civil rights organization in the United States that works exclusively on a full-time basis in mass communications. Some of our accomplishments have included the sale of four radio stations and a major market VHF network affiliated TV station to blacks (at aggregate savings of about $10,000,000 below market price); the creation of a minority ownership investment fund capitalized at $750,000. The placement of $500,000 worth of accounts in black banks, grants, scholarships and educational internships valued at over $2,000,000 for black colleges. Finally, specific affirmative action commitments resulting in new hirings and promotions of minorities at all levels of the industry, plus the NBMC media resource center that refers individuals to media companies. For example in 1985, eleven (11) NBMC referrals were hired by the Westinghouse

Broadcast Company. Those hires ranged from production assistants to an executive producer.

NBMC wishes to express its concerns to this subcommittee on proposed bill S. 1277—"Broadcasting Improvements Act of 1987". We in particular are opposed to sections 101(j)(4) and 103(k)(1) which would prevent NBMC and other similar organizations from challenging license renewals which may not be in the public's interest or from receiving financial settlements if NBMC withdraws or does not file on a transfer application.

NBMC's record of job placements, enhanced visibility and encouragement of more sensitive programming directed at the black community is unquestioned. Sections 101(j)(4) and 103(k)(1) will extinguish and prevent blacks from addressing and having a forum to meet one on one with media companies. These provisions must be deleted!!!

NBMC is not opposed to the concept of deregulation. We do however have serious doubts as to its success in light of the FCC regulations which allow ownership of up to thirty-six (36) media properties. This policy has resulted in a stronger concentration among existing media companies. It has also resulted in less opportunities for black ownership of media properties.

In addition, there has been a marked decrease in public affairs, public service and children's programming. Under deregulation, programming was one of the first areas in broadcasting to suffer. While rules of deregulation relieved broadcasters of a certain amount of paperwork, it also relieved them of their specific responsibility to program their stations in the public interest. Immediately, consumers found themselves at the mercy of "more music, less talk" radio station formats. Immediately, news and public affairs programming went completely out of the window, leaving those of us who need more than a rhythmic beat to get through the day high and dry. The insensitivity of general managers around the country began to resurface in pursuit of the sole purpose to make a profit. While the world was "jammin' to a beat", the whole world seemed to be going to hell in handbasket and nobody, in particular, many of our young people, knew it.

On commercial television, public affairs programming, in particular, black public affairs programming is virtually non-existent and the Nation's Capitol is a prime example. Without calling names, stations that used to carry decent public affairs programs have since replaced them with dance shows and MTV.

Now calling names, TVX Corporation which owns WDCA-TV/Channel 20 here in Washington, D.C. has cut back employees and public service to the community. Panorama is no longer on WTTG–TV/Channel 5 and no commercial station in Washington, D.C. has a black public affairs program. The subcommittee should clearly have the FCC reconsider the public service, public affairs and children's programming.

There are several aspects of existing FCC programs which NBMC believes should be enhanced and strongly promoted. These FCC programs are: (1) tax certificate policy; (2) distress sale policy; and (3) using minority preference as a factor in the FCC comparative hearing process.

Before the existence of the tax certificate and distress sales policies, minorities were not only met with hostility, but virtually excluded from the ownership process. The comparative hearing process and the minority preference have also done much to serve a greater need in offering diversification of the airways.

In our executive summary of comments (MM Docket No. 86–484) in the matter of the FCC's comparative licensing, distress sales and tax certificate policies premised on racial, ethnic or gender classifications along with about nine (9) other black, Hispanic and Native American organizations submitted to the FCC in June 1987: We stated, "The minority ownership policies have brought new voices to the airwaves, serving the goals of the first amendment by providing the American public with the widest possible diversity of information, ideas, viewpoints, and cultures".

"Moreover, these policies have reduced the present effects of past discrimination in broadcasting and in such ancillary fields as broadcast education, finance and brokerage. Thus, the policies have been enormously helpful in assisting the marketplace to function effectively for all Americans". I would encourage each member of the subcommittee to review these comments thoroughly. Copies will be made available upon request.

Despite the dramatic affects these policies could have had on minority ownership, minorities at present own only approximately two percent of the broadcasting stations, representing less than one half of one percent (0.5%) of total stations owned.

At a minimum, these policies must be retained and enhanced and others are needed to ensure the advancement of minority ownership. Without it, there is no doubt in my mind that the "old boy network" will continue to prevail and this proc-

ess will revert back to something more ugly and discriminatory than it has ever been.

Deregulation has also affected employment, especially where minorities are concerned. Despite the fact the EEO (Equal Employment Opportunity) rules are still on the books, the mere mention that these rules were under attack created a very dangerous attitude among station management across the board. It created an attitude resembling that of the Jim Crow Segregationists, an attitude that is more prevalent than most people seem to believe. Those of us who work in the trenches see it nearly everyday. Some of the schemes managers and owners attempt are beyond belief.

Section 103(k)(1) would be a further retreat, since limitations on financial settlements attempts to remove the concerned citizens and public interest groups from the petition process which in the past has clearly gotten the attention of wrongdoers. To prohibit the establishment of agreements between broadcasters and citizens groups will completely undermine what progress has been made in reactivating affirmative action programs and the strengthening of those policies at individual companies. It serves no one when the rules are simply on the books but are not adhered to as was the case in many of the companies were affirmative action agreements were established. The National Black Media Coalition has provided a legitimate service in each of those instances and has pricked the consciences of broadcasters around the country via those agreements.

In conclusion, NBMC asks that this committee do two things; (1) direct the FCC to revisit the question of accountability and responsibility in public affairs, public service and children's programming; (2) delete sections 101(j)(4) and 103(k)(1) which would prevent NBMC and other public interest groups from challenging license renewals and receiving compensation when entering agreements with media companies.

Thank you.

Senator EXON. Thank you, Mr. Marshall.

Just let me add a comment there by saying that the FCC in the difficulties that some perceive that are being created there right now and some of the talk about additional comments—I can understand how that does concern some of you that are very much interested in a broad range of representation on that.

It is not unlike the difficulties that we are having with the ICC today. And the ICC's makeup is dictated primarily by the President's appointment to the ICC board. The handling of the radio matters, difficulties and confrontations and arguments once again reflect the President's appointment to the FCC board.

I would just issue one caution. Those are going to change over the years. You know, regardless what happens, we are not going to have Reagan Administration after 18 more months. And it might be that whoever comes in will begin to change philosophically some of the positions that the FCC and the ICC have taken that I think many members of our committee feel are not in the spirit, with the intent of the Staggers Act in the case of the ICC. And maybe the legislation that we are discussing this morning would not be necessary if there was a better understanding and interpretation under the Commission that has the regulations over the things that you are concerned about.

We will wind up then with Mr. Ramirez. Thank you for your patience, Mr. Ramirez. And I am pleased to recognize you now.

STATEMENT OF RICHARD P. RAMIREZ, ASTROLINE COMMUNICATIONS CO., LTD.

Mr. RAMIREZ. Thank you.

Senator, members of the subcommittee, I am Richard P. Ramirez, the general manager of WHCT television in Hartford, Connecticut. I am also the managing general partner and a part owner

of that television facility. And I appreciate this opportunity to testify this morning.

I am a minority broadcaster with over a decade experience in four major markets. And as a participant in the Federal Communications distress sale policy, I support the minority incentive provisions in the Broadcasting Improvement of 1987. I would like in order to comply with your time requests here submit for the record my reasons for that support and go on with my testimony.

Senator EXON. We are glad to have it.

Mr. RAMIREZ. In particular, both the tax certificate program and the distress sale policy which S. 1277 would maintain create no quotas for minorities in the broadcasting industry. These programs do not relieve any minority broadcaster from the statutory obligations to operate in the public interest, nor do they exempt him from the license challenges at renewal. As a broadcaster and as a manager, therefore, I am held to the same criteria as all other broadcasters.

In the regulated broadcasting industry an overriding objective must be a predictable, investment-oriented environment. The FCC's vacillating policies fatally undermine this objective, thus making fixed legislative minority incentive imperative. Advertisers, broadcasters, investors and employees of whatever background will shy away from a regulatory climate fraught with the uncertainty that has beset the Commission's minority incentive policies.

My experience is illustrative. In 1984, nearly three years ago, the FCC approved a distress sale of WHCT to Astroline. Since my company's purchase, we have been the ball in a legal ping-pong game between the Federal Communications Commission and the U.S. Court of Appeals. WHCT is now fighting for its survival despite diverse and outstanding programming because of the Commission's flip-flops.

The FCC affirmed our right to the distress sale in 1984. When the legality of the Astroline purchase was challenged, the FCC ardently defended the sale for the first two years of the litigation. In 1985 it argued in support of the sale to the U.S. Court of Appeals. In January of 1986 in oral arguments, the FCC affirmed the appropriateness of the distress sale as a regulatory remedy to the lack of minority participation in broadcast ownership. At the same time the FCC proposed expanding the distress sale policy.

Nine months later in 1986, as if struck by lightening, the Commission completely abandoned the minority incentives in another case. Incredibly, the Commission's legal somersault occurred simultaneously with the Supreme Court's pronouncements broadly affirming the constitutionality of minority and gender preferences. In effect, the Commission's intention was to fold our license grant, which had been decided in 1984 into an inquiry which was to commence in 1987. We are the only distress sale that FCC has granted which is now having its license questioned because of the inquiry into minority incentives.

Other members of the broadcast community are appalled at this treatment. I would like to submit also for the record public statements of the National Association of Broadcasters.

Senator EXON. Without objection, it is accepted.

Mr. RAMIREZ. Thank you, Senator.

I would like to conclude.

I am a former college line-backer, Senator. I do not mind playing the game, and I do not mind taking the hits. But I do mind being the ball. My partners and I placed good faith reliance in the FCC's seemingly unswerving support of these policies.

May I continue, sir?

Senator EXON. Yes.

Mr. RAMIREZ. In doing so, we are following the policies which were administered for over six years and upholds the goals which Congress and the courts repeatedly affirmed. We have invested more than $22 million in equity capital to completely rebuild the station and facilities and programming. In the process we created more than 50 jobs in the Hartford area and reactivated a station that had been dormant for many years. In doing so, we increased competition and stimulated growth.

Long-term advertising contracts because of the FCC fluctuations are very difficult to obtain. Outside investments and outside financing are totally impossible to obtain with a license that is totally in jeopardy. The employee morale has plummeted. As an example, we recently lost the general sales manager at the station. How is it that I go about recruiting a broadcast professional to come to my station with the tenuous nature of our license?

Mr. Chairman, the FCC has two excellent minority incentive programs. Without direct statutory edict, however, these policies are at the mercy of changes in the agency's leadership, politics and procedures. Stability in the broadcast community is undermined and experiences like Astroline's are the absurd and tragic result.

The broadcasting community supports these limited and voluntary incentive policies. They are important to create diversity in ownership and programming, and they deserve to have the force of law. I strongly urge the committee to approve the legislation necessary to maintain the minority incentive provisions.

Thank you for your consideration.

[The statement and questions follow:]

STATEMENT OF RICHARD P. RAMIREZ, GENERAL MANAGER OF WHCT-TV, HARTFORD, CT

Mr. Chairman and Members of the Subcommittee: I am Richard P. Ramirez, General Manager of WHCT-TV of Hartford, Connecticut, and part owner and Managing General Partner of Astroline Communications Company. I appreciate the opportunity to testify today on the minority preference provisions contained in S. 1277, the "Broadcast Improvement Act of 1987."

As a minority broadcaster with over a decade of experience in four major markets throughout the country, and as a participant in the Federal Communications Commission's (FCC) distress sale policy, I strongly support the minority preference provisions in the bill. Specifically. I believe that the modest incentives offered for minority entry into the ownership and operation of broadcast stations under the bill accomplish several goals.

They increase competition and stimulate economic development at little or no cost to the Government.

They are consistent with the cherished American ethic of individual entrepreneurship as the dominant force in the marketplace.

They enrich public debate, diversity of programming and education to the benefit of listeners and viewers.

They can be administered without flagrant abuses through a few simple statutory safeguards.

They are voluntary programs which address the historic imbalance in minority ownership. As such, they are strongly endorsed by the broadcast industry.

They provide a low cost and expeditious alternative to the lengthy and expensive comparative hearing process.

They withstand even the most stringent constitutional test.

They bolster legal predictability essential to sensible business planning and financing.

As provided by Congress, the tax certificate program enables a broadcast owner to defer taxes on the profit of a sale to a minority-controlled buyer with the approval of the FCC. Approximately 125 broadcast sales have occurred pursuant to this program over the past decade.

The distress sale policy authorizes a broadcaster threatened with license revocation to avoid losing all of his or her investment by selling to a minority-controlled buyer for three-fourths or less of the station's fair market value. Thirty-seven sales have been consummated under the policy since the FCC inaugurated it in 1978. I have noted those sales that in particular have expanded competition in their markets because of substantial capital investment and increased diversity in programming.

Minority Ownership Lists—Stations that have elected to seek distress sale relief

Total distress sales approved:	
1978	0
1979	3
1980	22
1981	2
1982	0
1983	0
1984	6
1985	2
1986	2
1987[1] (as of 7/13) [2]	0
Tax Certificates Issued (Broadcast Stations and Cable Television Facilities Lists):	
1978	4
1979	12
1980	10
1981	15
1982	15
1983	10
1984	11
1985	17
1986	16
1987[1] (as of 7/13) [2]	15

[1] No Activity while awaiting decision in MM Docket No. 86-484.

[2] (Updated July 13, 1987 by FCC Consumer Assistance and Small Business Division, Office of Congressional and Public Affairs.)

I acquired WHCT-TV in Hartford, Connecticut pursuant to the distress sale policy in 1985. To my knowledge, this was the last time the FCC approved a distress sale of a television station.

The tax certificate program and distress sale policy create no quotas for minorities in the broadcasting industry. Over a decade, they have raised minority ownership of broadcast stations by only one percent of the 12,000 commercial broadcast outlets operating.

Furthermore, the minority preferences endorsed by these programs do not relieve any benefited minority broadcaster from the statutory obligation to operate in the public interest. In this regard, a minority broadcaster is held to the same standards as industry giants such as CBS, ABC, and NBC. Additionally, a minority license, like all others, is vulnerable to competitive challenge at renewal periods of five years for a television station or seven years for a radio station. These features of broadcast regulations prevent any minority from maintaining a license unless his or her performance is every bit as good as the industry norm. Thus, the boost minority broadcasters get is a one-shot push, not a long-term act of favoritism. Minority preferences in broadcasting thus avoid the danger of cultivating a social or cultural stigma because of a community misperception that minority licensees are less capable or talented than their non-minority counterparts the preferences do not detract from the idea that individual merit should be the determinant for success in broadcasting, like it is in any other industry.

Minority preferences in broadcasting are also sound social policy because they further programming diversity and enrich public dialogue. Courts have recognized this and declared that minority ownership of broadcast stations coupled with minority participation can reasonably be presumed to foster programming diversity. Justice Powell in the celebrated *Bakke* case similarly presumed that the presence of minorities in the classroom enhanced educational diversity. And Congress made the same presumption in ordaining minority preferences in mass media lotteries in 1982. In the conference report that accompanied this legislation, the conferees said that they expected FCC's lottery rules to provide preferences to minority-controlled applicants, "the grant to whom of the license or permit sought would increase the diversification of the media of mass communications."

These presumptions are corroborated by experience. Alex Haley's renowned *Roots*, for instance, could not have been authored with its riveting pathos, anguish, and poignancy by a white. And *Roots* created a marketplace demand, and widened opportunities for other authors. *Roots* was later made into a television series that set new national ratings records of audience viewership. Thus, minority broadcasters can create a marketplace demand for programming derived from a distinct racial perspective that most often is not created by non-minority broadcasters.

The programming achievements of Astroline as the new licensee of WHCT-TV, Hartford, Connecticut are also informative. Although 20.4 percent of the Hartford community is Hispanic, until Astroline became the licensee of WHCT-TV, there was very limited bilingual programming in the Hartford area. Specifically, the Spanish International Network broadcasts from Secaucus, New Jersey, but only via paid cable subscription, a luxury that the vast majority of Puerto Rican/Hispanic citizens of Hartford cannot afford. Channel 30 of New Britain, Connecticut, offers a one half-hour, locally-produced Spanish-language public affairs show entitled "Adelante." It airs only on Sundays. Channel 61 of Hartford, Connecticut offers Spanish voice-over versions of such shows as "Different Strokes," "One Day At a Time," and "Black Sheep Squadron." However, in order to take advantage of this Channel, a consumer generally must buy a VCR or a television equipped with "second audio program" which ranges from $500 to $800. Again, this is a luxury that the majority of Puerto Rican/Hispanic families in this community cannot afford.

The programming decisions at WHCT-TV are made by myself as General Manager, Station Manager Terry Planell, and Director of Community Affairs Migdalia Vazquez-Fernandez. All of us are Americans of Hispanic descent rooted in Puerto Rican and Cuban cultures. I grew up in an area in New York City commonly referred to as Fort Apache. My family could hardly afford a television set, and ownership of a television station was unthinkable. If it were not for the tireless work of my mother and dad and my good fortune to get an athletic scholarship to Boston College, I might still be on the corner of 123rd Street and Bronx Avenue. Now that I have obtained an education and planted the seeds of entrepreneurship, you can best believe that I haven't forgotten my roots. Every day I walk into the television station, I recall how empty the television seemed with no programs that I could relate to. The heritage and concerns that I hold for the minority viewpoint have been translated into specific programs shown on WHCT-TV.

WHCT-TV airs several regularly scheduled bilingual programs: "Carrascolendas," a program aimed toward Hispanic children; "Sonrisas," a program that addresses everyday problems experienced by children and adolescents of various Hispanic cultures; "Villa Alegra," a magazine format program that blends live characters, film and animation to present a wide ranging and challenging curriculum to youngsters of all social backgrounds; and "Que Pasa, USA," a program portraying a three-generation Cuban-American family attempting to bridge the generation gap.

WHCT-TV has also produced numerous bilingual public service announcements regarding cultural and social issues, which are of considerable interest and importance to the Puerto Rican/Hispanic population of Hartford. WHCT's bilingual programs are culturally and socially significant to the Puerto Rican/Hispanic community, not "Hollywood" clones with a Spanish-language second audio program (SAP).

WHCT-TV also dedicates its programming efforts to the substantial black community in Hartford. We regularly broadcast "Julia," the story of a single Black mother and her son experiencing the hardships of growing up; and "Essence, The Television Program," a weekly half-hour magazine format program featuring interviews with major Black celebrities. Also, WHCT-TV ran many specials throughout the year that focused on Black individuals or organizations.

WHCT-TV has also increased diversity and competition in non-minority programming, by airing special children's and sports programming. The station broadcasts more local sports than any other television station in the State of Connecticut. WHCT-TV was recently awarded the broadcasting rights to the Hartford Whalers'

Hockey team away games; the University of Hartford Hawks' games; and the Connecticut Bowlers Association's games. In addition, WHCT-TV has produced a half-hour special featuring the Hartford Whalers.

Presuming broadcast diversity because of ownership diversity is no novelty in law or policy. The vast array of multiple and cross-ownership rules of the FCC presume that different types of owners yield different types of programming. Minority preferences in broadcasting entail no different type of diversity presumption.

Minority preferences have enhanced, not degraded the quality of broadcast programming. Of the approximately 200 minority broadcasters, not a single minority station has ever failed to satisfy the public interest standard of the Communications Act, nor has any minority license been revoked.

The preferences are also socially cohesive. They have not aroused public resentment or community strife, but instead have provided hope and fairness to the minority community.

Similarly, the cultural pervasiveness of television and radio in the United States and historical discrimination against minorities mandate a visible minority presence in the broadcasting industry to create an appearance of racial justice. That appearance acts as a community inspiration, not as a social sore.

The broadcasting industry as a whole has encouraged and supported the FCC's policies designed to enhance minority ownership. The National Association of Broadcasters on more than one occasion has said "[m]inority ownership contributes to important goals of the Communications Act by its potential for expanding broadcast service responsive to the needs and interest of the nation's minority population, and the possibility that it will increase diversity of viewpoint. . . ."

Worries have been expressed that minority preferences are vulnerable to abuse. After obtaining a broadcast license through the means of a preference, it is said, a minority can swiftly sell to a non-minority for a profit. The programming diversity and social goals of the preferences are lost by such quick flipping of licenses.

It is also said that minority owners may not be genuine participants in broadcast operations, but merely fronts for non-minority domination of a station.

These potential problems can be addressed by legislative or administrative safeguards. For instance, currently there is a one-year holding period for any minority whose broadcast ownership is obtained through a minority preference program. This requirement could be increased to three years and the FCC granted authority to waive the holding period for exceptional hardship, or if the sale were in exchange for another station or to another minority owner.

Additionally, the FCC should be required to revoke any license that was obtained through a minority preference program where misrepresentations or falsehoods were made describing the extent of minority involvement in operational decisions.

Nothing in the history of minority preferences in broadcasting suggests that these types of shams are so pervasive as to justify elimination of the program. For every minority sham, I can point to a non-minority scheme similarly conceived to thwart FCC rules, such as collusive cellular phone lottery applicants. Therefore, remember, "one bad apple don't spoil the bunch!"

Minority preferences in broadcasting ownership and operation are constitutionally irreproachable. The United States Supreme Court has proclaimed that both blacks and Hispanics have been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." The historical discrimination against Blacks and Hispanics in the United States provides a constitutional predicate for minority preference programs in broadcasting because there is a rational nexus between the discrimination and severe under-representation of minorities in the industry. That is, the discrimination deprived minorities of the financial muscle and education needed for entry. The Congress and the Supreme Court employed a similar type of reasoning in approving various provisions of the Voting Rights Act offering special legal protections for minority voters.

In addition, the Supreme Court has repeatedly affirmed that the benefited minorities under a remedial program need not be proven victims of past illegal discriminations. Indeed, in the recent *Johnson* case, the Supreme Court has endorsed the legality of voluntary affirmative action programs initiated by government or private industry to overcome severe under-representation of minorities or females in various fields that are not directly traceable to past discrimination. The voluntary nature of the distress sale and tax certificate programs is one of the key beneficial elements of these programs. Each broadcaster must individually choose to participate in the program. No one is putting a gun to their heads. They are totally voluntary private-sector programs that offer modest economic incentives to participate. These incen-

tives are not as coersive as the threat to withhold federal funding to public schools or other institutions that do not admit Blacks or Hispanics.

In the regulated broadcasting industry, an overriding objective must be a predictable, investment-oriented environment indispensable to high-quality and diversified programming. The FCC's vascillating policies fatally undermine this objective, thus making fixed legislative minority preferences imperative. Businessmen, broadcasters, investors and employees of whatever stripe will shy away from a regulatory climate fraught with the uncertainty that has beset the Commission's minority preference policies.

My experience is illustrative. In 1985 I acquired WHCT-TV in Hartford, Connecticut for $3.1 million pursuant to the distress sale policy. To my knowledge, this was the last time the FCC approved a distress sale of a television station. Since my company's purchase, we have been the ball in a legal ping-pong game between the FCC and the U.S. Court of Appeals. WHCT is now fighting for its survivial, despite its diverse and outstanding programming, because of the Commission's belated legal revisionism.

The FCC affirmed our right to a distress sale in 1984. Then the legality of the Astroline purchase was challenged by a broadcasting rival claimant. The FCC ardently defended the constitutionality of the distress sale policy during the first two years of litigation. In 1985, it affirmed our right to the U.S. Court of Appeals. Nine months later in January of 1986, in oral argument the FCC affirmed the constitutional appropriateness of the distress sale as a regulatory remedy to the lack of minority participation in broadcast ownership. At the same time, the FCC proposed expanding the distress sale policy.

Then, later in 1986, as if struck by a lightening bolt, the Commission completely and abruptly abandoned the minority preference policies in another case. It then requested a remand from the Court of Appeals in order to fold our case into a review of the constitutionality of minority and female preferences. In effect, the Commission's intention was to fold our license application, which was decided in 1984, into an inquiry which did not commence until 1987. Incredibly, the Commission's legal somersault occurred simultaneously with the Supreme Court's pronouncements broadly affirming the constitutionality of minority and gender preference policies.

We have bounced back and forth since 1984. The FCC's erratric actions left the U.S. Court of Appeals with the impression that the broad policy actions needed to be addressed, and it remanded our case and directed the FCC to fold it into the FCC's inquiry. Our case is now at the FCC until they complete this review. The timetable for the inquiry has been extended twice in the past seven months. There is no indication when it will be concluded.

We are the only distress sale the FCC has granted which is now having its license questioned because of the FCC's inquiry into minority preferences. Other members of the broadcasting community are appalled at this treatment. The National Association of Broadcasters has filed comments with the FCC and publicly stated that any change in policy should not be applied retroactively.

Now, I'm a former college linebacker. I don't mind playing the game and taking the hits, but I do object to being the ball. My partners and I placed reliance on the FCC's seemingly unswerving support. In doing so we were following a policy which the FCC had administered for six years previously, and the goals of which Congress had repeatedly affirmed. We invested more than $26 million in equity capital to upgrade the station facilities and programming. In the process, we created more than 50 jobs in the Hartford area and activated a station that had been moribund for many years. This substantial investment, and the jobs with it, are now at stake. We cannot seek outside financing or obtain long-term advertising contracts while our license is in question, and our efforts to attract investors and employees is similarly hindered. Employee morale has plummeted.

CONCLUSION

The FCC has two excellent minority preference policies. Without a direct statutory edict, however, these policies are at the mercy of changes in the agency's leadership, politics or procedures; stability in the broadcast community is undermined; and experiences like Astroline's are the absurd and tragic result.

The broadcasting community supports these limited policies. They are important to create diversity in ownership and programming, and they deserve to have the force of law. I strongly urge this committee to approve the legislation necessary to maintain the minority preference provisions.

Thank you for your consideration.

Questions of Senator Inouye and The Answers

Question 1. Mr. Ramirez, what is the corporate structure of Astroline?

Answer. The corporate structure of Astroline Communications Company, Ltd. Partnership (Astroline) is as follows:

[In percent]

Name and partnership interest	Equity interest	Voting interest
Richard Ramirez [1], general partner	21	78
Terry Planell [1], limited partner	3	0
WHCT Mngmnt, Inc.[2], general partner	6	22
Astroline Co.[2], limited partner	58	0
Thelma Gibbs, limited partner	6	0
Martha & Robert Rose, limited partner	6	0

[1] Mr. Ramirez is an Hispanic male and Ms. Planell is an Hispanic female.
[2] WHCT Management, Inc. and Astroline Company both are wholly-owned by five partners.

Question 2. Does your contract contain a provision pursuant to which you can be forced to sell your interest within a certain number of years?

Answer. No, my contract does not contain such a provision.

Question 3. What percentage of the station's employees are members of minority groups and women?

Answer. WHCT-TV employs 47 full-time employees and 2 part-time employees. Of the full-time employees, 19 percent are members of minority groups and 36 percent are women (28 percent of the women are also members of minority groups).

Minorities and women are employed at every level in the station, including as officials and managers, professionals (assistant managers, producers, and editors), sales representatives, and technicians. For example, 30 percent of the officials and managers are minorities, including Ms. Terry Planell, who is our Station Manager and Program Director, and myself, and 61 percent are women (37 percent of the women are also minorities). Nine percent of the professionals are minorities and 36 percent are women.

Question 4. What percentage of your programming is geared toward minorities and women?

Answer. The question of whether a program is geared toward minorities or women is a very subjective one. For example, WHCT-TV makes a point of acquiring programs in which minorities serve as role models. One such program that we regularly broadcast is "Julia," the story of a single Black mother and her son experiencing the hardships of growing up. Another program is "Chico and the Man." Whether these programs can be characterized as geared toward minorities and women depends on one's perspective. For this reason, it is difficult to provide an accurate view of our programming by answering this question in percentage terms. A better way to answer it is by citing specific examples.

WHCT-TV airs several regularly scheduled bilingual programs: "Carrascolendas," a program aimed toward Hispanic children; "Sonrisas," a program that addresses everyday problems experienced by children and adolescents of various Hispanic cultures; "Villa Alegre," a magazine format program that blends live characters, film and animation to present a wide ranging and challenging curriculum to youngsters of all social backgrounds; and "Que Pasa, USA," a program portraying a three-generation Cuban-American family attempting to bridge the generation gap.

Within the last year, WHCT-TV has run specials aired in Spanish such as "The Stableboy's Christmas," an Emmy Award winner, and "Easter: Three Days," a powerful drama dealing specifically with the time from Jesus' death to the resurrection. In addition, we have produced or run specials featuring minority individuals or organizations. Among the most memorable of these specials is a half-hour documentary we produced and created called "Poetry in Motion." The program explored a citywide choral and recitation contest held for middle schools within the Hartford Public School System. The majority of the children in these schools are Black and Puerto Rican/Hispanic. The special featured performances by the semifinalists and winners and interviews with the winners, their teachers, parents, principals and judges. Moreover, WHCT-TV has produced numerous bilingual public service announcements regarding cultural and social issues, which are of considerable interest and importance to the Puerto Rican/Hispanic population of Hartford.

WHCT-TV also dedicates its programming efforts to the substantial Black community in Hartford. We regularly broadcast "Essence, The Television Program," a weekly half-hour magazine and news service program featuring interviews with major Black celebrities and "Elbony Jet Showcase," a weekly half-hour magazine format program featuring interviews with newsmakers in entertainment, sports, and business.

We ran numerous specials throughout the year that focused on Black individuals or organizations. Among these were: "King," the epic struggle of the Civil Rights Movement led by Dr. Martin Luther King, Jr. and starring Paul Winfield and Cicely Tyson; "Story of A People," a four-part documentary that explores some of the popular myths and misconceptions of Black Life as it pertains to family, youth, images, and power; "Celebration of Black Culture," a two-part program covering the history and contributions of Black Americans to dance, theater, film, and art; "African American Achievers in History," a series of 28 90-second vignettes saluting Black Americans and their contributions in such diverse fields as politics, fashion, science, sports, and entertainment; and "The Best of the Superfests," a musical benefit hosted by Lou Rawls for the United College Negro Fund.

This coming season, we have added two new programs: "Showcase at the Appollo," a weekly entertainment program produced at the historic Appollo Theater in Harlem, N.Y. and "The Making of a Holiday," a one-hour documentary highlighting the events and personalities involved in the effort to make Martin Luther King's birthday a national holiday.

Question 5. Do you believe that the policy should be expanded to include women?

Answer. I believe that women currently are underrepresented in the ownership and operation of broadcast stations. Accordingly, I would not oppose expanding the distress sale policy to include women. I would recommend, however, that any such statutory expansion require that women demonstrate career expertise in broadcasting and commit to work full time at the proposed station in order to qualify. This would accomplish two purposes. First, it would provide for a natural link between the Equal Employment Opportunity programs already established by the FCC and Congress and this ownership incentive. Second, it would prevent certain abuses of this ownerhip incentive.

Question 6. Do you think that this policy differs significantly from the preference policies in comparative hearings?

Answer. The distress sale policy and the preference policies in comparative hearings share the same goals—to increase ownership and operation of broadcast stations by underrepresented groups and thereby to increase diversity in programming. There are some important differences between the policies, however.

First, the distress sale policy is voluntary in nature. In other words, it is up to the existing licensee to decide whether to sell a station pursuant to the policy or not. Second, the distress sale policy reduces the administrative burden involved in the sale by providing for the disposition of both the license issue and the transfer of control without a costly and lengthy comparative or renewal hearing. Third, the distress sale policy has had a very small impact on the broadcast industry. As I noted in my prepared testimony, there have been less than forty distress sales over a decade in an industry with over 13,000 outlets operating. Indeed, there has been only one television station distress sale since 1981. Fourth, the industry supports distress sales. The National Association of Broadcasters has repeatedly filed comments at the FCC in support of the policy.

Senator EXON. Thank you, Mr. Ramirez.

I have some questions that will be submitted to you for the record that we would like your prompt response on. I thank you for coming here this morning.

In closing this down, just let me say to you that I hear very loud and clear your concerns. We are always wrestling up here at this end of the table as to what laws do we change and how do we change them, and is it wise to change them because of the current makeup of some of these boards appointed by the President of the United States.

And you know, one of the obligations that you have I think in directing news is to help the public understand that when they elect the President of the United States—and they elected this one overwhelmingly—they must not be very much concerned about the

concerns that you were expressing here this morning or else they do not know about it.

I would simply say to each and everyone of you that we should have a little better understanding that when we do cast our votes, we are casting a vote for other than just personalities. I would simply say God help you in your concerns if Ollie North is the next President of the United States. But that's a possibility.

Mr. KAGAN. You just started the campaign, Senator.

Senator EXON. So, you have some information responsibilities that I know you try and carry out, and I think you should continue in the future.

I must leave. Ms. Charren, you want to say something, so I am going to give you an opportunity.

Ms. CHARREN. Oh, you are a sweetheart. I just want to say that this morning the idea of meritorious came up for discussion, and most people sitting here seemed to have trouble dealing with how you define meritorious. I think it is sort of easy for children because meritorious to Action for Children's Television means choice. It means entertainment and information, your fiction and nonfiction. You can think of the way a librarian stocks a children's library. Choice has to be in a democratic society we think, the operative solution to speech needs on the part of the public, and that we think that every station has to provide this choice when it comes to children's television in contrast maybe to radio format problems because the marketplace does not work to provide diversity.

And if enough people are doing it, there is going to be some diversity, and secondly, because the cost of the alternative technologies are too much for poor families and there is reduced access to cable and home video from the very kids who need the alternative information the most.

Senator EXON. Thank you very much. My wife and I have three children. They are beyond the age where they are going to be influenced by either television or radio, but we have eight grandchildren that we are very much concerned about. And thank you for your good work.

Ms. CHARREN. Thank you.

Senator EXON. Thank all of you for coming here this morning and we are adjourned.

[Whereupon, at 11:45 a.m., the subcommittee was adjourned.]

BROADCASTING IMPROVEMENTS ACT OF 1987

MONDAY, JULY 20, 1987

U. S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON COMMUNICATIONS,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:02 p.m., in room SR-253, Russell Senate Office Building, Hon. Wendell H. Ford presiding.

OPENING STATEMENT BY SENATOR FORD

Senator FORD. We are here today for our second day of hearing on the Broadcasting Improvements Act of 1987.

The first panel will address the heart of this legislation, I think, the standard by which broadcast licensees should be judged in determining whether they have served the public interest.

I am personally very concerned about this issue and believe this debate is long overdue.

Our second panel will focus on the provisions of this legislation, codifying the Commission's policies designed to encourage minority and female ownership of broadcast stations.

These provisions were included in response to Commission action, looking toward elimination of these policies.

I want to take this opportunity to thank our witnesses for coming here today, and I look forward to hearing their testimony.

I am very delighted to have Senator Packwood here.

Senator, do you have any opening statement you would like to make?

Senator PACKWOOD. No statement, Mr. Chairman. I made mine last week.

Senator FORD. Fine.

The first panel will be Mr. Edward O. Fritts, president, National Association of Broadcasters; Mr. Henry Geller, Washington Center for Public Policy; Mr. Joel Chaseman, president, Post-Newsweek Stations, Inc.; and Mr. Ed Godfrey, news director, WAVE TV in Louisville, KY.

Mr. Fritts, we'll ask you to go first, and we will try to take you in the order in which I called your names.

STATEMENTS OF EDWARD O. FRITTS, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL ASSOCIATION OF BROADCASTERS; HENRY GELLER, WASHINGTON CENTER FOR PUBLIC POLICY; JOEL CHASEMAN, PRESIDENT, POST-NEWSWEEK STATIONS, INC.; AND ED GODFREY, NEWS DIRECTOR, WAVE-TV, LOUISVILLE, KY

Mr. FRITTS. Thank you, Mr. Chairman.

I am Edward O. Fritts, president and chief executive officer of the National Association of Broadcasters.

We appreciate the opportunity to testify today on S. 1277, the Broadcasting Improvements Act of 1987.

We have a prepared statement which we have filed for the record. I will summarize that if I could.

Several remarks in the letter of invitation appear to reflect a belief that the public interest is incompatible with or even mutually exclusive of the marketplace and broadcasters' commercial gain.

I must respectfully disagree because, in fact, these elements are inextricably linked.

We have found that the best and most successful stations, those that succeed in the long run and those that are attractive to buyers, are those with a strong identity created by service to their local communities.

There seems to be a growing perception that the public interest standard has been gutted and that broadcast deregulation has been a disaster for the public, and has unleashed a wave of unprincipled station owners and operators upon society.

Nothing could be further from the truth.

Broadcast deregulation, on the whole, has been good for our industry and good for the public we serve. The new forces unleashed by deregulation and the increased reliance upon competition, both within broadcasting and from other communications media, have presented challenges as well as opportunities for our industry.

But NAB must strongly oppose a wholesale return to unneeded and overly restrictive Federal regulations.

Nothing that has resulted from the past decade of deregulation warrants such a turning back of the clock. The industry has not been overrun by fast buck artists, nor do I detect a lessening of the commitment of our members, old and new alike, to serving the public.

The broadcasting industry is united on several points. Our members do not support a return of the old system of over-regulation. The present structure, within which broadcasters can serve the public without unnecessary paperwork and within which they have a broad editorial discretion, comports with the First Amendment, the Communications Act and other economic realities.

I might add that it also comports with what we think is just good common sense.

We have a system in which stations have the flexibility to serve the public in innovative ways. When stations find areas in which they can serve the public better than their competition, stations and their local communities are better off.

While we cannot support S. 1277, it contains concepts of which we do approve. We support, for example, the bill's prohibition on

payoffs. We applaud the bill's repeal of the must-carry sunset. And we generally support the provisions designed to enhance minority ownership opportunities.

Finally, we are pleased that the sponsors again recognize the need for the reform of the license renewal process and would replace the present system with a two step renewal proceeding.

Comparative renewal is inherently unfair because it permits a challenger to throw the incumbent into a full scale renewal hearing merely by filing a competing application.

Moreover, the challenger can simply tailor his application to be preferred on all the comparative criteria despite the absence of any record of performance.

The FCC is confronted with a virtually impossible administrative dilemma, comparing apples—the challenger's promises—with oranges—the broadcaster's record of performance.

Efforts by the FCC and the courts over the years to make sense of comparative renewals have resulted in detailed, time consuming, and costly hearing procedures that ultimately frustrate rather than further the public interest.

The direct impact of comparative renewals on licensees can be severe. A 1983 NAB analysis revealed that such challenges for both radio and television lasted an average of seven years and ten months, and each case involved over 5,000 pages of testimony, exhibits, letters, petitions, decisions and other statements.

The average cost for legal fees in the sample of comparative renewal cases amounted to $830,000 per incident, exclusive of television revenue lost while cases were pending and of agreements in which the incumbent assumed the debt of the challenging party.

Small market station costs ran an average of $257,000, while larger market legal expenses topped $1.25 million.

The public, too, is ill served by this process. A station whose financial and human resources are being siphoned off by a comparative renewal challenge cannot provide the full measure of service to the public to which it is entitled.

The enactment of legislation to reform license renewals has long been a priority of the NAB, and we urge the Senate again to consider such reforms. We do not view the elimination of comparative renewals as deregulation, but as necessary correction of a flaw in the act governing our industry.

In fact, the earliest Senate proposals to reform the renewal process came long before anyone ever heard of the word "deregulation."

We recognize that the legislative process is one in which compromise and trade-offs are the rule, and that any broadcast legislation that advances will have minuses as well as pluses for our industry.

NAB has accepted the invitation of key House Members to meet with them and other interested parties to work toward a balanced bill. We do not have an agreement on many points, but we remain confident progress can be made.

We do support H.R. 1140, introduced by Representatives Tauke and Tauzin, which has 120 cosponsors.

On the Senate side, interested parties had no input into the drafting of S. 1277. We appreciate Senator Inouye's assurance, how-

ever, that sponsors are willing to work with all sides to develop properly balanced legislation.

We'll be happy to work with you if you intend to make improvements in the bill, for we believe improvements are needed.

NAB strongly opposes the current bill because, unlike the previous Senate bills, S. 1277 has a price tag for needed reform that is prohibitively high.

We thank you for considering our views, and I will be happy to answer your questions at the appropriate time.

[The statement and questions follow:]

STATEMENT OF EDWARD O. FRITTS, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL ASSOCIATION OF BROADCASTERS

Mr. Chairman and members of the Communications Subcommittee, I am Edward O. Fritts, President and Chief Executive Officer of the National Association of Broadcasters. NAB is a non-profit trade association representing more than 5,000 commercial radio stations, 940 commercial televisions stations, and the major commercial networks. I appreciate the opportunity to testify on S. 1277, the Boradcasting Improvements Act of 1987.

The letter of invitation from the full Committee and Subcommittee Chairmen requested that I discuss not only the specific provisons of S. 1277, but also the second thoughts of these Senators about certain aspects of broadcast deregulation. I will begin, therefore, with a few general reactions to their broader concerns.

In the letter of invitation, the Chairmen state that:

Over the past 10 years, the government has eliminated many regulations affecting broadcasters. While we disputed some of these actions, we generally supported this deregulation because the broadcast marketplace had become more competitive. We are now, however, seeing numerous problems resulting from these deregulatory actions. We find this most disconcerting. It is this troubling situation—where broadcasters have more incentives to seek commercial gain that to further the public interest—that was the basis of S. 1277. We seek in this legislation to create a proper balance between the public interest obligations of broadcasters and the broadcaster interest to operate unfettered in the marketplace.

The remarks appear to reflect a belief with which I must respectfully disagree—that the public interest is incompatible with or even mutually exclusive of the marketplace and a broadcaster's commercial gain. In fact, these elements are inextricably linked. Broadcasters have long recognized that we will prosper in a very competitive market only by serving the public well. We have found that the best and most successful stations—those that succeed in the long run, those that are attractive to buyers—are those with a strong identity created by service to their local communities.

There seems to be a growing perception that the public interest standard has been gutted, that broadcast deregulation has been a disaster for the public, and has unleased a wave of unprincipled station owners and operators upon society. Nothing could be further from the truth.

Broadcast deregulation, on the whole, has been good for our industry, and good for the public we serve. I do not suggest that some fine tuning of deregulation is not needed, or that deregulation has been an unmitigated good for our industry. The new forces unleashed by deregulation and increased reliance upon competition—both within broadcasting and from other communications media—have presented challenges as well as opportunities for our industry. But the NAB and its members must strongly oppose a wholesale return to unneeded and overly restrictive federal regulations. Nothing that has resulted from the past decade of deregulation warrants such a turning back of the clock.

I can assure you that the membership I speak for today is diverse and dynamic. We sometimes disagree among ourselves on issues, including many of those being addressed in these hearings. We have had many lengthy and spirited discussions in our Board and among our membership on whether to support or oppose various rulemaking or legislative proposals. We have not embraced all deregulatory proceedings with open arms, nor have we always agreed with the pace of deregulation. Undoubtedly we will continue to have such internal disputes in the future. The debates are welcome, and our diversity on policy issues should reassure those who assume that broadcasting is a monolithic and monopolistic industry and that deregulation has served only to exacerbate those tendencies.

On several basic points, the industry is united. First, our members do not support a return to the old system of over-regulation. The present structure, within which broadcasters can serve the public without unnecessary paperwork, and within which they have broad editorial discretion, comports with the First Amendment, the Communications Act, and with economic realities. It also comports with common sense. We have a system in which stations have the flexibility to serve the public in innovative ways. When stations find areas in which they can serve the public better than their competition, stations and the local communities are better off.

Second, the broadcasting industry clearly recognizes and embraces our obligation to serve the public interest. The Communications Act says we must, but we would do so regardless, because this is in our best interest. The industry has not been overrun by fast buck artists, nor do I detect a lessening in the commitment of our members—old and new alike—to serving the public.

While we cannot support S. 1277, it contains concepts of which we do approve. We are pleased, for example, that the sponsors again recognize the need for reform of the license renewal process.

Broadcasters have long sought such reform, and the courts, the FCC and Congress have agreed that the renewal process should be revamped. In 1969, Senator John Pastore, the Chairman of the Communications Subcommittee, said that "public service is neither encouraged nor promoted by placing a sword of Damocles over the heads of broadcasters at renewal time." [1] Commissioners Benjamin Hooks and Joseph Fogarty characterized the comparative renewal process as follows:

The most accurate way to describe the situation with respect to comparative renewals is, to borrow from Sir Winson Churchill, that is a riddle within an enigma within a conundrum. The riddle: by what standards is a renewal applicant to be measured. The enigma: by what standards is a renewal challenger to be measured. The ultimate conundrum of course, even assuming the measurement of such respective standards, how can there be constructed a matrix which can be used to rationally measure and compare two largely unrelatable properties: an empirical property (an existing record) and an *a priori* property (a set of applicant pledges): [2]

Comparative renewal is an inherently unfair procedure because it permits a challenger to throw the incumbent into a full scale renewal hearing merely by filing a competing renewal application. Moreover, the challenger simply can tailor his application to be preferred on all the comparative criteria despite the absence of any record of performance. THe FCC is confronted with a virtually impossible administrative dilemma: comparing "apples"—the challenger's promises—with "oranges"—the broadcaster's record of performance. Efforts by the FCC and the courts over the years to make sense of comparative renewals have resulted in detailed, time-consuming and costly hearing procedures that ultimately frustrate rather than further the public interest.

The direct impact of comparative renewals on licensees can be severe:

An NAB survey of recent and pending renewal challenges revealed that the renewal challenges (both radio and television) occurring in the decade of the 1970's lasted an average of *7 years and 10 months*, and each case involved over *5,000* pages of testimony, exhibits, letters, petitions, decisions and other statements.

The average cost for legal fees in the sample of comparative renewal cases amounted to *$830,000* per incident ($595,000 for radio and nearly $1.2 million for television), exclusive of station revenue lost while cases were pending and of agreements in which the incumbent assumed the debt of the challenging party.

Small market station costs ran an average of *$257,000*, while larger market station legal expenses toped *$1.25 million*.

The burdens of a comparative renewal proceeding are not limited to the size of legal bills or the years of depositions and hearings. Comparative proceedings impose other ongoing penalties on licensees:

Because investment in a station involved in a comparative renewal challenge is discouraged, the station finds it difficult to raise the capital necessary to invest in new equipment or programming. Comparative renewal proceedings last so long that licensees suffer even though most eventually are renewed.

Renewal proceedings generate continuing adverse publicity. Every management decision or minor failing of a licensee, its parent corporation and other subsidiaries is magnified, scrutinized and publicized during the years of comparative renewal

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[1] Opening Statement of Chairman, Hearings on S. 2004 before the Communications Subcommittee of the Senate Committee on Commerce 91st Cong., 2d Sess., Ser. No. 91-18.

[2] Separate Statement of the Commissioners Benjamin L. Hooks and Joseph R. Fogarty, *Report and Order* in Docket No. 19154, FCC 77-204, 66 FCC 2d 419, 433 (1977).

proceedings. Ongoing publicity invariably affects company prestige and employee morale.

The public, too, is ill-served by this process. A station whose financial and human resources are being siphoned off by a comparative renewal challenge cannot provide the full measure of service to which the public is entitled.

The two-step renewal process first advocated by Senator Pastore would provide an expectation of renewal to broadcasters who faithfully serve their communities. Without such an expectancy, licensees are reluctant to make long-term plans and investments, and the industry as a whole is much more unstable.

In the initial step of a two-step renewal process, the incumbent broadcaster's application would be examined in isolation by the FCC. If the broadcaster had provided service that was responsive to issues in its community of license and had committed no serious violations of the Communications Act, the license would be renewed. But, if after a hearing, the incumbent broadcaster was found to have failed to meet this standard or to have committed serious violations of the Act, the renewal application would be denied and the license held open for competing applicants. This relatively simple, but effective, reform was outlined in S. 2004, introduced by Senator Pastore in the 91st Congress. Congress continued to consider renewal reform proposals during the 1970's and 1980's, but legislation was never enacted into law.[3]

During this decade, the Senate clearly has expressed broad, bipartisan support for license renewal reform. In both the 97th and 98th Congresses, the Senate approved—*by voice vote*—legislation providing for a two-step renewal process. Like Senator Pastore's S. 2004, both Senator Cannon's bill (S. 1629 in the 97th) and Senator Goldwater's bill (S. 55 in the 98th) provided simple, straightforward solutions to the problems of comparative renewals.

The enactment of legislation to reform license renewals has long been a priority of NAB. We urge the Senate again to consider such reforms. We do not view the elimination of comparative renewal as "deregulation, " but as a necessary correction of a flaw in the Act governing or industry.

We do, however, recognize that the legislative process is one in which compromise and trade-offs are the rule, and that any broadcast legislation that advances will have minuses as well as pluses for our industry. NAB has accepted the invitation of key House members to meet with them and with other broadcasting and public interest group representatives to work towards a balanced bill. As you may already know, we still do not have an agreement on many points, but we remain confident that process can be made. We do support H.R. 1140, introduced by Representatives Tauke and Tauzin, which has 120 cosponsors.

On the Senate side, the sponsors of S. 1277 have taken a different tack. Interested parties had no input into the drafting of this bill. We appreciate Senator Inouye's assurance, however, that the sponsors are willing to work with all sides to develop "properly balanced" legislation. We will be happy to work with you and your staffs if you intend to make improvements to the bill, for we believe improvements are needed. NAB strongly opposes the current bill, because unlike previous Senate bills, S. 1277 presents to the broadcasting industry a "price tag" for needed reform that is prohibitively high.

At this point, it may be appropriate to discuss several of NAB's greatest concerns regarding to S. 1277.

I. RENEWAL OF A LICENSE—SECTION 101

The framework provided by Section 101 is based upon the two-step renewal process that NAB has supported in previous legislation. Again, the FCC shall renew the application of a licensee if it finds the licensee has operated in the public interest and is free of other violations of the Act or Commission regulations; and in reviewing the licensee's application, the FCC will not consider competing applications. However, NAB opposes the specifics of this section.

A. "Meritorious" and Responsive Programming

NAB recognizes that a two-step renewal bill must implicitly or explicitly restate a public interest standard against which the incumbent broadcaster's application will be measured. Indeed, the public interest standard provides the foundation for a legitimate renewal expectancy. For this and other reasons, NAB embraces the public interest concept. NAB opposes, however, any public interest standard that allows the federal government to make quantitative or qualitative judgments as to a sta-

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[3] A review of this legislative activity is provided in the Senate Conmmerce Committee's Report on S. 1629. S. Rep. N. 292, 96th Cong., 1st Sess. (1981).

tion's programming or broadcast material. Such a standard establishes the government as a "super editor" and raises serious First Amendment concerns.

S. 1277, in part, provides that a broadcaster's programming would be found in the public interest if it has been "meritorious" *and* if it has been responsive to local issues, interests and concerns. This establishes at least two separate tests for programming—it must be meritorious *and* responsive—and would appear to permit (if not actually invite) government intrusions in the editorial discretion of broadcasters. In addition, the term "meritorious" has been virtually impossible to define thus far in *comparative* renewal contests, and S. 1277 would now inject this term into a *non-comparative* renewal process. A new use of a term with such a tortured history would need to be accompanied by clear legislative guidance to the FCC, the courts and the industry.

It would be premature to specify exactly what renewal language NAB could support. I urge the Subcommittee, however, to favorably consider the provisions of H.R. 1140. This bill provides that an incumbent licensee is worthy of renewal if, in part, the FCC finds that the licensee has "broadcast material responsive to matters of concern to the residents of its service area." Licensees may take into consideration the programming provided by other stations in the service area in developing such responsive material. H.R. 1140 also provides important protections for licensees' good faith and reasonable editorial judgments, and bars the FCC from establishing requirements for specific categories of programs.

B. Children's and Non-entertainment Programming

S. 1277 further defies the public interest for *television* licensees to include (in addition to meritorious *and* responsive programming) non-entertainment programming *and* programming directed toward children. The specification of programming categories by statute or regulation raises immediate First Amendment concerns, and NAB flatly must oppose any legislation that contains such provisions.

This in no way suggests that NAB disfavors children's programming, non-entertainment programming, or any other laudable category of programming. Again, broadcasters willingly acknowledge that we have basic obligations, unaffected by deregulation, to serve our communities in the public interest. These communities include, in part, children and people who are interested in non-entertainment programming. We oppose, however, any provision that will impose specific programming policies that are inevitably followed by government intrusions into our editorial processes.

II. CODIFICATION OF THE "THREE YEAR RULE"—SECTION 201

NAB strongly opposes any legislation that would, in isolation, codify the FCC's old three year rule on the holding period for a broadcast license.

Those who support reimposition of the anti-trafficking rules do so out of concern that the supposed turbulence in ownership of broadcast properties jeopardizes the entire range of "public interest" programming provided by radio and television licensees. This concern assumes the recent rise in transfers of broadcast properties is fueled by speculators who trade in stations indiscriminately. The assumption is that increased trading in stations results in licensees who are more concerned with maximizing the value of the property and reducing programming costs than with executing their public interest responsibilities.

There seems to be an intuitive sense that a three year rule would strengthen a broadcaster's public interest efforts. In essence, the argument is that acquiescence to a restriction on the transferability of a license reflects a higher public interest commitment on the part of a broadcaster. The basic economic fact is that a well run, profitable station better serves the public and is worth more to a prospective purchaser than a fly-by-night operation. The best, most successful stations are built in part on a strong commitment to the communities they serve.

Furthermore, there are indications that reimposition of the rule would be most harmful to single station owners, small chain owners, women, minorities and other small entrepreneurial concerns in their attempts to gain station financing.

Although NAB definitely opposes "stand alone" legislation on the three year rule, we take no position on whether we could support a direct or indirect restriction on license transferability if it were included as part of an otherwise acceptable license renewal reform bill.

III. CODIFICATION OF THE FCC'S OWNERSHIP RULES—SECTION 403

Section 403 codifies the FCC's multiple ownership rules in effect on May 1, 1987. These rules include the so-called 12 station rule, the duopoly rule, the one-to-a-

market rule, and the broadcast/newspaper cross-ownership rules. NAB strongly opposes any effort to codify these rules.

Under the Communications Act, these ownership issues traditionally and appropriately have been addressed by the Commission, with Congressional oversight. While these rules effectuate important diversity principles, it would be unwise for Congress to suddenly and completely eliminate the FCC's discretion to tailor ownership rules to meet the ever-changing needs of the communications media and the public they serve.

For example, the FCC presently is considering a proceeding to revise the duopoly rule as it applies to AM radio ownership, in order to enhance the competitiveness of that service (MM Docket No. 87–7). The government and the broadcasting industry have recognized that AM radio has lost a degree of its competitive potential, and are taking steps to remedy this condition. If Congress codifies these ownership rules, then an important tool that the Commission could use to improve AM service to local communities would be lost.

The Subcommittee should reject this provision, and rely upon its well-demonstrated abilities to provide guidance to the FCC if it determines that the Commission is applying its discretion unwisely in ownership issues.

In conclusion, let me repeat that although the NAB opposes S. 1277 as it presently stands, we are willing to work with you and your staff to develop appropriate and balanced legislation. Thank you for your consideration of our views.

QUESTIONS OF SENATOR INOUYE AND THE ANSWERS

RENEWAL

1. Q. *Members of the panel, am I correct that each of you believes that there should be a public interest standard for broadcast licensees?*

   A. Yes. Given the present structure of the Communications Act and the Federal Communications Commission's licensing procedures, broadcast licensees have an obligation to serve their communities in the public interest.

2. Q. *Are you also in agreement that the Commission should consider whether a broadcaster has served the public interest before renewing the license?*

   A. Yes. The public interest standard provides the basis for a licensee's expectation of renewal.

3. Q. *Can each of you state what you believe licensees should be required to demonstrate under the public interest standard?*

   A. In terms of legislation to clarify broadcasters' public interest obligations, NAB supports a standard such as the one contained in H.R. 1140. This bill provides that an incumbent licensee is worthy of renewal if, in part, the FCC finds that the licensee has "broadcast material responsive to matters of concern to the residents of its service area." Licensees may take into consideration the programming provided by other stations in the service area in developing such responsive material. H.R. 1140 also provides important protections for licensees' good faith and reasonable editorial judgments, and bars the FCC from establishing requirements for specific categories of programs.

4. Q. *Can the Commission determine whether a licensee has been serving the public without considering the station's programming?*

   A. Under current law, the FCC must consider, to some degree, a station's programming in its determination of whether that station has fulfilled its public interest obligations. Any programming evaluation, however, must afford maximum deference to the broadcaster's editorial discretion and good faith judgments on programming decisions, in keeping with the First Amendment and Section 326 of the Act. For a more detailed explanation of NAB's position, please note the attached copy of the June, 1986 Policy Statement entitled "Broadcasters' Public Interest Responsibilities and the Renewal Process."

5. Q. *Can you explain how a member of the public could demonstrate that a licensee has not been serving the public under the Commissions present rules?*

   A. Under existing law, a member of the public may demonstrate, in several ways, that a broadcast licensee has not been serving the public. This demonstration likely would take the form of a "petition to deny" the renewal of a broadcast station license.

   First, were a station not to be maintaining quarterly "issues/programs" lists describing programs which significantly treated community issues, this fact could form the basis of a petition to deny. Similarly, a petition to deny could be filed where the broadcaster did maintain such quarterly issues/programs lists yet the petitioner perceived that such lists did not demonstrate a pattern of broadcaster responsiveness to local issues through programming.

   A petition to deny also could bring the Commission's attention to alleged violations of a variety of other program-related rules and policies. These include violations of (1) the "equal opportunities" and "lowest unit charge" requirements of Section 315 of the Communications Act, (2) the Commission's personal attack and political editorial rules, (3) the "reasonable access" provisions of Section 312 (a)(7), (4) the airing of contests, promotions and other material which might violate the federal lottery laws, or (5) failure to comply with the Commission's EEO rules and policies.

   In addition to the issues/programs lists being available to document certain programming efforts of broadcasters, each station's "political file" contains materials that would be relevant to allegations concerning violations of rules and law in the area of political advertisements, etc.

6. Q. *Mr. Fritts, Mr. Chaseman in his testimony indicates that the Post-Newsweek stations would not object to the requirement that it make certain programming records available to the public. Does the NAB oppose the requirement?*

   A. No. To the extent, however, that the Committee is considering legislation to require broadcasters to maintain programming records more extensive than the quarterly "issues/program" lists, NAB would oppose provisions placing undue burdens on broadcasters.

7. Q. *Mr. Fritts, Mr. Chaseman [illegible] it is our understanding that although stations are not required to maintain programming records by the FCC, many still do so for business purposes and to protect them in the event of a renewal challenge. Is that true?*

A. *Yes, virtually every station maintains "program logs" of sorts. These logs generally do not contain specific issue-related material; and many stations include confidential financial information (such as advertising costs per spot, costs of program time, etc.) in their logs, the release of which could be damaging to the stations' competitive positions if public disclosure were required. The Committee should not assume that such program logs would be suitable for programming evaluation purposes, nor that stations would not be burdened by requiring disclosure of these logs.*

8. Q. *Mr. Fritts, [illegible] and Mr. Chaseman, could you please respond to Mr. Geller's suggestion that the Commission establish percentage guidelines for television licensees in two areas: local and informational programming? Mr. Geller contends that this would eliminate subjectivity and uncertainty.*

A. NAB strongly opposes legislation or regulations to impose percentage guidelines or to otherwise quantify programming categories. Such provisions, we believe, raise serious First Amendment concerns. Furthermore, while such guidelines might reduce "subjectivity" and "uncertainty" to some degree, they also would correspondingly reduce broadcasters' editorial flexibility and would result in uniform blandness in programming that would ill serve the public.

MULTIPLE OWNERSHIP

1. Q. *Members of the panel, do you agree that the goal of the multiple ownership rules is to promote diversity?*

A. Yes.

2. Q. *In order to promote diversity, should we limit the number of stations that one entity can own or control in one market?*

A. If this question relates to legislation to codify multiple ownership rules, NAB is opposed to such legislation. NAB is not opposed to the concept of multiple ownership rules, but we believe these rules should be left wholly within the administrative jurisdiction of the FCC, with appropriate Congressional oversight.

3. Q. *When the Commission expanded its rules allowing station owners to hold 12 AM, 12 FM, and 12 TV stations the FCC indicated that the local ownership restrictions would become more important to ensure diversity. Have there been any changes in the broadcast marketplace to indicate that these rules are less important today?*

A. *The broadcast marketplace, and the larger communications marketplace in which it fits, evolve rapidly. Such rapid change is one reason why NAB believes the multiple ownership rules should remain within the administrative bounds of the FCC, the expert agency established by the, Congress. Some of the factors the FCC may wish to consider as it periodically reviews the multiple ownership rules include the competitive status of the various services within broadcasting itself, the status of broadcast services vis-a-vis established competing services like cable, and the effect of newer services on broadcasting such as VCR's and satellite dishes. The FCC also should examine the role of non-electronic media, such as newspapers, magazines and other publications, within the media marketplace.*

Rapid changes in the communications marketplace may not eliminate the importance of local ownership restrictions, but they suggest that the FCC should have the flexibility to respond to new circumstances.

4. Q. *Mr. Fritts, aside from the concern about the viability of AM stations, how would the public interest be served by the relaxation of the ownership rules? Mr. Geller do you agree?*

A. *There may be other circumstances in which the total number of media outlets in a community would permit common ownership of two or more of these outlets without reducing the overall diversity of viewpoints within that community. When one or both of these voices might fail under separate ownership, but both would survive under common ownership, then "diversity" and the public interest could be served by relaxing the ownership rules.*

MINORITY OWNERSHIP

1. Q. *Mr. Fritts, does your organization support the retention of the Commission's tax certificate and distress sale policies?*

A. Yes.

Senator FORD. Thank you, Mr. Fritts.

Next will be Mr. Geller

Mr. GELLER. Thank you, Mr. Chairman.

As public fiduciaries, the broadcasters, when they come up for renewal, must show that they have served the public interest. As you know, there are two types of renewal. One is the ordinary renewal, where there could be a petition to deny and the broadcaster has to show that, at the least, he serves some minimal amount of public service. The other is the one we have been discussing here, the comparative renewal, where there is a challenger and the broadcaster, in order to win, has to show that it has rendered meritorious service.

The purpose of the comparative renewal is to spur that level of service called "meritorious" of "substantial," something above minimal.

If he does that, he is well on his way to renewal.

Now, I am in agreement with Eddie Fritts that the process over the decades has not served the public interest well. It is very long—8 years, as you have heard. It is very expensive. I would go on to say the incumbent always wins, no matter what his past record is. And it has generally been stultifying.

But—and it's a big "but"—the purpose of the comparative renewal, Mr. Chairman, is very sound. It is to spur that meritorious service.

If you simply eliminate the comparative renewal and do nothing more, you're saying to the American people that it is perfectly all right if the broadcaster only renders mediocre service.

Therefore I strongly support what you have in S. 1277. You have eliminated a process that has not worked. But, in place of it, you have substituted a standard, "meritorious" and you have said to the broadcaster that you have to meet it.

Now, the broadcasters, at least some of them, argue that that leads to qualitative and quantitative standards, to programming categories. I agree with what you said at the opening, that it is important to analyze just what is involved here.

The broadcaster has to run on a past record of public service. In television, I submit to you, that means local and informational programming, including for children.

I say this to you because that is what you specified in your legislation—the 1934 Communications Act. You said in 307(b) and in 303(s) that you want local service. And the FCC has allocated on that basis. That is the Six Report and Order.

That is why Baltimore has channels and why Washington has channels, instead of having them served from one common point.

So you have to get local service or you undermine the statute and the allocation scheme.

The same thing is true of informational service. In section 315, you said that you want a contribution by broadcasting to an informed electorate, and the FCC has allocated on that basis.

It has said that the reason why it has given so much spectrum to broadcasting is because of the contribution it can make to an informed electorate.

So, once more you have a statutory scheme, an allocation scheme, and that is why I say you have to focus on those two bedrock areas of local and information.

Now, however you look at them, however you define public service and whatever standard you use, whether you use the standard that Mr. Fritts seems to like, responsive to issues, or you use my standard, meritorious, in implementing that standard, you have to do it in a way that is objective and effective.

You can't just look at a list of programs and judge quality. That is impossible. It would be a first amendment horror.

And if you can't do quality, all that you are left with is quantity.

That is why I have urged to you that what you ought to do is take these two bedrock categories of local and information and look at what the television broadcaster is doing, grouping him appropriately—large market, small market, VHF, UHF, independent, network affiliate—and specify some reasonable figure around the median and say that that is what has to be met during the broadcast day.

Now, the broadcasters argue that you are interfering with their editorial discretion. But they can choose what local programs they want to put on. They have wide discretion as to what informational programs.

What you are interfering with is their discretion not to put on local and informational programming. But you are interfering with that because those are the rules. They have volunteered to serve the public interest and you, Congress, have specified that you want local and informational and that's the allocation scheme.

If they don't deliver that, you have nothing. They ought to step aside and let somebody on who will do that.

I would point out that on must carry, they are asking to be carried as local outlets. If they don't render local service, then how, on what basis? You might as well just rely on cable or direct broadcast satellite, and give this spectrum to land mobile.

So, what I say in conclusion is a challenge to the broadcasters, and that is if they are going to show a past record of public service—how? Are they just going to ask the FCC to look at a list of programs and say yes, that's good, that's responsive? That's impossible.

It's like Churchill's aphorism on democracy: quantitative standards are the best thing when you look at the alternatives.

Thank you.

[The statement and questions follow:]

STATEMENT OF HENRY GELLER

I am the director of the Washington Center for Public Policy Research of Duke University, but the views I express here are solely my own. They are based on my long experience as a Government official in this area, including NTIA Administrator during the Carter Administration and General Counsel of the FCC in the period 1964-1970.

I shall discuss the renewal process generally, including the FCC's deregulatory actions since 1981, and then each section of the bill. I strongly support S. 1277 and indeed, my criticism is that it does not go far enough to protect the public interest.

You are most familiar with the basic scheme. More people want to broadcast than there are available frequencies (i.e., the scarcity basis). The Government must choose one person to broadcast on a particular channel, and enjoin all others from using that channel. In order to promote the First Amendment rights of those thus

excluded, the Government has decided upon a system of short term, public interest licensing: Those who receive this *free* license volunteer to act as a public fiduciary for the people in their communities (the excluded). This scheme has been held to be constitutional in the 1943 *NBC* case and again in the 1969 *Red Lion* case.

Under this scheme, the FCC is to renew licenses of these fiduciaries only if it finds that they have operated in the public interest. The essence of such operation is public service programming. In its 1981 *Radio Deregulation* and 1984 *Television Deregulation* decisions, the FCC shifted its focus on public service programming from nonentertainment to community issue-oriented programming (defined broadly in the dictionary sense). That's a mistake for reasons I will discuss shortly. But even worse, the Commission shifted to the postcard renewal approach.

The Commission itself now receives no programming information; it renews stations with only a postcard before it, stating that all required information has been placed in the public file. It is thus placing complete reliance on the public to bring to its attention any case of inadequate public service operation (i.e., insufficient issue-oriented programming). But the public is busy with its own matters; there is no basis, in theory or experience, for the agency to shift this statutory burden to the public. The public files very few petitions to deny, and even those few rarely deal with overall programming service (EEO matters predominate). It is absurd to call upon the public to monitor the performance of over 10,000 broadcast stations.

Further, the Commission was never really serious about this reliance upon the public. If it were, it would not at the same time have tried to deprive the public of the information it needs in order to perform the exclusive "watch-dog" function being thrust upon it by the Commission. For the Commission eliminated its requirement of logs, and instead simply required the licensee to list quarterly at least five example issues, with some illustrative programs under each issue. Such a list would show only a minuscule amount of the station's issue-oriented programming; to determine the overall amount, the public would be put to the extraordinary burden of monitoring the many stations in the area. It took two appeals to the Court, to force the Commission to provide sufficient information so that the public, without monitoring, can file petitions to deny renewals of station licenses.

Further, the Commission itself has no notion of how its deregulatory policies are working. It gets no programming data and conducts no special studies. As the Court in *UCC III* stressed, it is folly to deregulate and leave oneself entirely in the dark as to the results of that deregulation. The one study done by RTNDA in 1984 indicated cause for concern, since it found that public affairs programming—the in-depth treatment of issues—has suffered "a substantial reduction in airtime" since the FCC's 1981 deregulatory action (The New York Times, Sept. 17, 1984, at C17).

The public interest has thus suffered greatly. But I also want to make clear just how incompetently the FCC has acted in this field. As I said, it shifted from focusing on nonentertainment programming to community issue oriented programming. That's odd because nonentertainment is as broad a category as you can get, and you want to afford the broadcaster maximum discretion. If the broadcaster presents a religious program like a Christmas service or an educational program, that's clearly public service, even if it doesn't deal with an issue, however broadly you define that term.

The shift thus makes no sense from a definitional point, but the real problem comes in logging. The broadcaster has to keep records of all his public service programming, since he can be challenged at renewal. His lawyers tell him to do so, as do Commissioners. See, e.g., *Broadcasting Mag.*, Sept. 29, 1986, at 76. As noted, he even has to make public quarterly reports showing his most significant treatment of the issues to which he gave the greatest coverage, so the public has a basis for a *prima facie* case in a petition to deny.

This means that the broadcaster is keeping two sets of records. For as the NRBA told the Commission (55 RR2d at 94), broadcasters have to keep comprehensive records of their programs and commercials for *business* purposes. It's undisputed that this is necessary for billing purposes. See *Broadcasting Mag.*, Aug. 15, 1983, at 27-28 ("The Myth of Deregulation"); *The Wall Street Journal*, Dec. 13, 1982, at A29. Further, the new set of records as to community issue-oriented fare involves *managerial* time, and thus imposes a larger burden on this score.

This is crazy. The whole idea is to deregulate—to lessen the burden on the broadcaster. You'd think that the FCC would simply say, "Just make available at the station the logs you are keeping for business purposes (denoting the program as entertainment or nonentertainment—a *clerical* activity) and send us a postcard." Instead, while talking about the thousands of hours of logging time, *it deliberately imposes an additional and unnecessary logging burden on the broadcaster.* It's most fitting that *TV Deregulation* occurred in 1984, the year of George Orwell's famous novel

with its "doublespeak" concept: In the name of deregulation, the agency imposes greater regulation.

What's just as crazy is the reaction of the industry and the watch dogs. The NRBA has made clear that the Emperor has no clothes. The NAB, however, says it's O.K. (55 RR2d at 94).

Nor is that the end of problems stemming from an issue-oriented approach. Such an approach inevitably takes the agency into a sensitive and forbidden area. In *Radio Deregulation*, the FCC states (84 FCC2d at 991):

A station with good programs addressing public issues and aired during high listenership times but amounting to only 3% of its weekly programming may be doing a superior job to a station airing 6% nonentertainment programming little of which deals in a meaningful fashion with public issues or which is aired when the audience is small.

So the FCC is now going to determine what programs are "good" or deal in a "meaningful" way with issues.

The decision in *TV Deregulation* takes the same tack. The FCC stressed there that "petitioners raising programming issues will have to demonstrate that an individual station is failing to address issues facing the community in its programming" (98 FCC2d at 1093-95, pars. 37, 39):

The focus of our inquiry in the petition to deny context can be expected to be whether the challenged licensee acted reasonably in choosing the issues it addressed in its programming. Assessing the reasonableness of a licensee's decision will necessitate an *ad hoc* review to examine the circumstances in which the programming decision was made . . .

I can think of nothing more chilling or inappropriate than to have the FCC as the national nanny of issue decisions by broadcasters.

And again a crazy thing happened. We protested to the Commission and the Court this qualitative focus. The broadcasters, led by CBS and NAB, supported it and won, with the Court saying (*UCC IV*, 779 F.2d at 712):

We agree that the Commission has adopted an approach to the question of community-responsive programming that emphasizes the quality of a broadcaster's efforts, not the quantity of its nonentertainment programming. A petitioner must amass sufficient facts to put the overall *quality* of a licensee's broadcasting into dispute . . . (emphasis in original).

If the FCC which I serve as General Counsel in the 60's had adopted such a quality approach, the broadcasters would have been outraged—and correctly so.

Let me sum up this point. Broadcasters can still be challenged at renewal, but because the FCC adopted the cockamamie community issue-oriented approach, broadcasters have a considerable added record-keeping burden, *and* the standard at renewal is a musky, improper qualitative one under which the agency could make any judgment it wants.

The Commission actions most inimical to the public interest have come in the area of children's television. Since Peggy Charren will be covering this area in her presentation, I will not go over the same ground here. I do join in her statement and her conclusion that this is a national scandal.

With this as background, I turn now to the specific sections and provisions of S. 1277.

I agree that the comparative renewal process has been a botch, taking many years of hearings and always resulting in the renewal of the incumbent, no matter what his past record has been. I would therefore eliminate the process, as the bill does. But the purpose of the comparative renewal process was sound—to spur meritorious as against service just minimally meeting the public interest standard. If therefore the comparative renewal is eliminated, there must be a provision directed to achieving its sound goal—meritorious service. Otherwise, the Congress would be saying to the American people: "We are indifferent whether you get meritorous or mediocre, minimal service." I therefore again commend the approach of the bill, and its use of the meritorous standard in Section 101. I also endorse the return to "non-entertainment programming" and the specific reference to "programming directed towards children" in 101 (2)(A), although I believe that much more is needed as to the latter category, for the reasons stated by Peggy Charren.

I heartily concur with the provision in subsection (3) calling for random sampling of 10% of the television renewal applicants. This will go a long way toward remedying the damage done by postcard renewal. The Commission will once more be the entity responsible for insuring compliance with the public interest standard, rather than improperly delegating that responsibility wholly to the petitioner to deny.

I would, however, go further than the bill, with its general provisions, in Section 102, and would require the FCC to establish percentage guidelines for meritorious

service in television for the two critical programming areas—local and informational (including children's informational). These areas are Congressionally mandated (see Sections 307(b), 303(s), and 315(a)), and constitute the basis of the Commission's allocation scheme for broadcasting. The percentages should reflect a reasonable notion of meritorious service (i.e., somewhere reasonably around the median for stations appropriately grouped as to their nature—large or small market; VHF or UHF; network affiliate or independent) and for the hours, 6 a.m. to midnight and prime time. All stations would be required to meet the guidelines or establish good causes for not doing so, with a report to Congress of any waivers. I have set out in the Appendix to this Statement an illustration of such a legislative approach.

Sound policy, I believe, strongly calls for the rule rather than the *ad hoc* approach. The latter disserves the public interest for two reasons. First, it does not inform the broadcaster or the public of what are the licensee's responsibilities in this most important programming area. Terms such as "meritorious", "reasonable" or "substantial" amounts of informational programming are mushy. As former Chairman Burch testified concerning such terms, "[t]hese are, in the vernacular, "marshmallow phrases—they mean almost nothing in and of themselves or, conversely, almost anything that one wants them to mean . . ." Vagueness, with its consequent "unbridled administrative discretion" (*id.* at 1119), creates a further danger that the renewal evaluation might chill the exercise of licensee First Amendment rights. As the Court stated in *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 854 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 1007 (1971), "a question would arise whether administrative discretion to deny renewal expectancies, which must exist under any standard, must not be reasonably confined by ground rules and standards. . . ."

This point is crucial. It is not a matter of the FCC's avoiding appraisal of the renewal applicant's programming under one approach as compared with another. Under the statutory scheme, as stated, the critical issue is the incumbent's record, and programming is the essence of that record. The question is whether in this sensitive area, the First Amendment is served by examination of an incumbent's programming without any objective standards which the licensee has had the opportunity to meet.

There is the second policy point—the *ad hoc* approach is ineffective. Because terms such as "meritorious" or "substantial" amount of time do not really inform the licensee of its responsibilities, and because the commercial nature of the licensee militates against performance in this area, particularly in public affairs, there is a tendency for many stations to perform poorly. If the renewal applicant then faces a challenge to its operation on this score, there is also a tendency for the agency to protect the applicant against the challenge. For broadcasters are operating in the dark because of FCC failure, and the agency is thus a partner to the station's dilemma at renewal. If the FCC moves against the broadcaster in these "subjective" circumstance, there is both unfairness and the serious First Amendment problems noted in *Greater Boston, supra.* In short, there is a wide gap between the promise of the FCC's high sounding proclamations and its performance in implementing them on an *ad hoc* basis.

I will comment only briefly on the remaining provisions. I agree with the thrust of Section 103, Limitations on Financial Settlements, but believe that it may be too broadly worded. No payment should go to petitioner or to any person or group affiliated with or in any way associated with petitioner. But many petitions can be appropriately resolved by licensee agreement, for example, to expend funds for special minority training programs or minority programming efforts that do not at all involve the petitioner (or direct any financial benefit to petitioner, directly or indirectly). I suggest that the legislation be clarified to permit continuation of this salutary process.

In Title II, Broadcast Ownership Stability Period of Ownership, I again endorse the bill. It is simply wrong for the FCC to hold that no antitrafficking policy is needed—that when the station is being directed to its "higher valued [financial] use", the public interest is then being served. That is not at all true of nonentertainment programming such as public affairs (documentaries) or informational children's programming. The trafficker is interested in maximizing the dollars from his investment and moving on to the next—not public service.

For example, most public affairs programs are much lower rated than entertainment or news programs in the same time period. Regulation is needed to spur their presentation. See *RTNDA Communicator*, May 1985, at 14: "Public affairs, meanwhile, has suffered a substantial net reduction in air time since the FCC dropped minimum requirements on the amount of time to be devoted to news and public affairs".

Or take the vital area of children's television: A broadcaster can present a straight cartoon covering a large age group or he can present an age-specific program that not only entertains but also informs or educates. A public trustee would take into account the obligation to discharge its public trust. But a trafficker would simply avoid such programming since it reduces the return and thus the resale price of the station. And here it is important to keep in mind that the commercial system militates against, not for, the presentation of age-specific informational programming for children. See *Children's Television Report,* 96 FCC2d 634, 654, n.49 (1984). As the Commission wisely said in 1974, public service to children can only be accomplished if the broadcaster puts children first and profits second.

I would suggest that for television the period be one license term, five years, rather than the three year period used in the bill. Otherwise, a trafficker could poorly serve the public interest for even four years, and still escape all scrutiny at renewal by selling after the three year period.

On Title III, Mandatory Carriage of Broadcast Signals, I agree that the "sunset" makes no sense. But I strongly urge that the Commission's present carriage is arbitrary and poor policy. It protects the powerful superstation or VHF broadcaster in the large market, but not the struggling small station serving a rural area or the UHF independent, facing serious financial difficulties. It delegates to the cable industry important responsibilities which the Commission itself should exercise, and endorses an industry compromise that glosses over the essential public interest. Oversight and revision by Congress are clearly called for.

On Title IV, Diversification in Ownership of Broadcast Stations, I endorse the provisions in Section 401–403. I do suggest that as to Section 401, you should bestow credit of a lesser nature to an applicant where there is minority of female ownership less than majority or controlling but fully integrated into the daily management of the broadcast station. Surely it should count that, for example, a minority person, while only a 10% owner, is station manager or program director. See *TV 9, Inc.* v. *FCC,* 495, F.2d 929 (D.C. Cir. 1973), *cert. denied,* 418 U.S. 986 (1974).

As to Section 403, on Multiple Ownership of Broadcast Stations, it is much needed. When the Commission relaxed the national limits in 1984, it stressed that what was important is diversification on the local level and therefore it intended to rely heavily on the local ownersihp restrictions, duopoly and one-to-a-market. Now, without any change circumstances or new developments since the strong assertion, the Commission wants to abandon or relax important local cross-ownership restrictions in the radio field (AM–VHF TV and possible FM–UHF TV in the same market). This is just a "shell game", with the Commission cynically moving the pea around. It is time for the Congress to call a halt.

We do not claim that there are never public interest grounds to waive these restrictions. There are (e.g., that a frequency has lain fallow for years). But there is no *general* basis for eliminating the rules, without regard to whether the benefits outweigh the clear detriment of the diversification loss. If, for example, the claim is made that the AM station will gain from efficiencies of joint operation (a dubious assertion, in my view), there is still the issue whether the profitable AM station will simply pocket the monies thus saved and not in any way benefit the public interest, which will then simply suffer the detriment of the significant diversification loss.

Finally, I also strongly endorse Section 501, Exchange of Broadcast Stations. Here the public interest is so clear that no comment is needed.

Thank you for the opportunity to address the important matters taken up in S. 1277. I believe that S. 1277 represents a constructive step as to these matters, and hope that the improvements I have suggested can be given serious consideration.

DUKE UNIVERSITY,
INSTITUTE OF POLICY SCIENCES AND PUBLIC AFFAIRS,
WASHINGTON CENTER FOR PUBLIC POLICY RESEARCH,
Washington, DC, July 24, 1987.

THOMAS COHEN,
Senior Counsel, Senate Committee on Commerce, Science and Transportation, Dirksen Senate Office Building, Washington, DC.

DEAR TOM AND TONI: This letter supplies answers to the hearing questions on the Broadcasting Improvements Act, Panel I.

RENEWAL

Question. Members of the panel, am I correct that each of you believes that there should be a public interest standard for broadcast licensees?

Answer. I do believe that there should be a public interest standard for broadcast licensees. That is the statutory scheme (see p. 1 of my Statement). I suggested that there should be consideration of a different statutory scheme for radio broadcast licensees (i.e., the spectrum usage fee with the proceeds dedicated to public broadcasting), but unless and until such a scheme is adopted, all broadcast licensees remain public fiduciaries.

Question. Are you also in agreement that the Commission should consider whether a broadcaster has served the public interest before renewing the license?

Answer. I believe that there is agreement that the Commission should consider whether a broadcaster has served the public interest before renewing the license. The statute (i.e., Section 307(d)) explicitly imposes this duty.

Question. Can each of you state what you believe licensees should be required to demonstrate under the public interest standard?

Answer. I believe that for television licensees the statutory standard should be meritorious service (with the comparative renewal eliminated), and that in determining whether the licensee has rendered such service, the Commission should focus on two bedrock areas, local and information programming (the latter defined broadly and including informational programming for children). I would adopt percentage guidelines for these two categories, along the lines set out in the Appendix to my Statement. The licensee would have wide discretion to choose the programming to be presented within these categories (but would of course have to make reasonable, good faith judgments so that, for example, a licensee would not be ignoring the 45% black or 40% Hispanic population within its area—see, e.g., *Lamar Life Broadcasting Co.,* 38 FCC 1143 (1965); *Alianza Federal de Mercedes* v. *FCC,* 539 F.2d 732, 738 (D.C. Cir. 1976)). A licensee would be required to meet these guidelines or show good cause to the Commission for failure to do so (e.g., a new UHF independent facing severe financial difficulties).

As for radio, I would proceed as indicated in my oral testimony (i.e., a reasonable standard for nonentertainment programming (e.g., 8–10%) in the 6 a.m. to midnight segment, with a much lower standard for the beautiful sound station that has cut down drastically on talk (e.g., 3–4%).

Question. Can you explain how a member of the public could demonstrate that a licensee has not been serving the public under the Commission's present rules?

Answer. A member of the public would have to look at the quarterly reports of issue-oriented programming, add up the amounts in the 6 a.m. to midnight segment, and if he or she concluded that the amount was below that minimally required to serve the public interest, would file a petition to deny the renewal. The burden would then be on the broadcaster to show that the amount was minimally sufficient, or to introduce new material demonstrating minimal compliance with the public interest standard. See *UCC III,* 707 F.2d 1413, 1433 (D.C. Cir. 1983); *UCC IV,* 779 F.2d 712, 708–14 (D.C. Cir. 1985).

The petitioner to deny could also focus on whether the licensee ". . . acted reasonably in choosing the issues it addressed in its programming . . ." *TV Deregulation,* 98 FCC2d at 1093–95, pars. 37, 39; see my Statement at 5. I would not, however, recommend that a petitioner proceed on this basis. As I said in my statement (at 5), I can think of nothing more chilling or inappropriate than than to have the FCC act as the "national nanny" of issue decisions by licensees. I am at a loss to explain why a deregulatory Commission, committed to First Amendment values, would proceed in such an unsound fashion.

MULTIPLE OWNERSHIP

Question. Members of the panel, do you agree that the goal of the multiple ownership rules is to promote diversity?

Answer. Yes; the purpose of the rules is to promote the diversification principle set out in *Associated Press* v. *U.S.,* 326 U.S. at 20 (". . . the widest possible dissemination of information from diverse and antagonistic sources"). See *First Report on Multiple Ownership,* 22 FCC2d 306, 311 (1970); H. Rept. No. 97–765, 97th Cong., 2d Sess., 40–45 (1982).

Question. In order to promote divesity, should we limit the number of stations that one entity can own or control in one market?

Answer. Yes; I strongly support both the duopoly and one-to-a-market rule. See *First Report* cited above, where the Commission stated

A proper objective is the maximum diversity of ownership that technology permits in each area. We are of the view that 60 different licensees are more desirable than 50, and even that 51 are more desirable than 50. In a rapidly changing social climate, communication of ideas is vital. If a city has 60 frequencies available but they are licensed to only 50 different licensees, the number of sources for ideas is not maximized. It might be that the 51st licensee would become the communication channel for a solution to severe local crisis. No one can say that present licensees are broadcasting everything worthwhile that can be communicated.

Question. When the Commission expanded its rules allowing station owners to hold 12 AM, 12 FM, and 12 TV stations, the FCC indicated that the local ownership restrictions would become more important to ensure diversity. Have there been any changes in the broadcast marketplace to indicate that those rules are less important today?

Answer. No, there are no such changes. The Commission alleges in its Notice the great growth in new information outlets (n.47, Notice in MM Doc. No. 87-7). But the very changes the Commission notes in the Notice were developed at length and relied upon in the relaxation of the multiple ownership restrictions—see 100 FCC2d at 25-31, 83 (" . . . the vast increase in the number of information services is an important factor . . ."); 101 FCC2d at 409-10—*when the Commission at the same time was stressing how important the local ownership restrictions are.* See 100 FCC2d at 20, 27, 30-31, 37, 54, 82, 83 (n.23), 100; 101 FCC2d at 408, 412-413. The plain and sorry fact is that the Commission is simply making up grounds for distinction to justify what it wants to do, and is thus engaged in a "shell game."

See also the *Regional Concentration* opinion, 101 FCC2d at 408, 412-13, where the Commission, while setting forth in detail "dramatic growth in the number and variety of outlets in recent years . . ." (at 408-411), stressed that "diversity and competition concerns in 'cross-service' situations will remain the subject of the 'one-to-a-market' rule which limits common ownership, operation, or control within a given market to one commercial AM-FM combination, or one commercial television station, or one daily newspaper . . ." (at 411-12) and that . . . in local market situations, we historically have found the need for regulatory assurance of diversity and competition more intense because the broadcast facilities at issue speak to the same audience and compete directly with one another. Accordingly, the "duopoly" and "one-to-a-market" rules are extremely strict, essentially requiring absolute ownership diversity . . . (at 408)

Sincerely,

HENRY GELLER.

Senator FORD. Thank you, Mr. Geller.

Mr. CHASEMAN.

Mr. CHASEMAN. Thank you, Mr. Chairman.

My name is Joel Chaseman. I am testifying here in three different capacities. First, I am a broadcaster. Second, I am president of Post-Newsweek Stations, Inc. Third, I am also chairman of the Television Operators' Caucus, which consists of 11 group television owners, with a combined total of 75 stations, reaching more than 50 million households.

As the chairman of the caucus, I want to reaffirm our organization's strong support for retaining the public interest standard in FCC decisions, including comparative renewal proceedings.

TOC is a very diverse group. But we do have an overwhelming consensus on the public interest standard.

We welcome the responsibility to present programming that is responsive to the needs and interests of local viewers, and we believe that the records of our member stations are evidence of their dedication to the public interest.

If the FCC did not consider an incumbent's past broadcast performance in comparative renewal proceedings, virtually all incumbent television stations and especially group owners would be in jeopardy.

The major factors remaining for comparing incumbents to challengers would be diversity of ownership and integration of owner-

ship with management. Group owners would be at a particular disadvantage under these criteria because by definition, they have other broadcast interests.

Group ownership enables stations to pool resources and share valuable experience, providing the public with significant benefits. It is not something to be discouraged.

But if diversity were the only criterion, an untried applicant with no other licenses would always have the edge, no matter how good the incumbent's performance has been.

We believe that elimination of the comparative renewal process would serve the interests of both the public and broadcasters. Therefore, we do not believe that its elimination should be contingent on the broadcast industry's making concessions.

The process is unfair and ineffective, and it should be eliminated for those reasons, and without additional conditions.

While our members unanimously support elimination of the comparative renewal process, all TOC members oppose substantial portions of the rest of S. 1277.

The Post-Newsweek stations have painful, first-hand experience with renewal challenges. In the early 1970s, our stations in Miami and Jacksonville were subjected to five debilitating, unfounded, and some say politically motivated comparative renewal challenges. We spent millions of pre-inflation dollars in legal fees, and thousands of hours of staff time defending those cases, resources that would have been better devoted to the operation of our stations.

The strain on our people was even worse than the cost. We were burdened with endless requests for discovery. For example, just one of those requests required us to sift through 14,000 pages of records to compile minutely detailed and virtually useless information about three years of public service announcements.

The public received no benefit from this ordeal.

That Post-Newsweek experience typifies the problems and risks to licensees inherent in the comparative renewal process. The process is too easy to invoke and much too burdensome to defend.

Anyone who fills out an FCC Form 301—a step that requires little effort or expense—can trigger an expensive and intrusive hearing process. The station is subjected to second-guessing of its past and uncertainty about its future that can paralyze enterprising journalism and adventuresome programming. Because this process is so easy to invoke, it is susceptible to political abuse; the mere threat of a prolonged and expensive license challenge can be used to chill the independence and integrity of a station's news, editorial and public affairs operations, even if the challenge would most likely be ultimately unsuccessful. Unfounded challenges that are motivated by national politics may be relatively rare, but such challenges can have their origins in local politics as well. In fact, any citizen with a grudge of any kind can target a station for revenge through the comparative renewal process.

Moreover, the entire comparative process is fatally flawed, because it compares paper potential to proven performance. The incumbent must defend a record that is real, and that has been shaped by thousands of actual operating decisions. A challenger, by contrast, is free to design a model application, an idealized fantasy,

based on paper regulations, not day to day reality, and certainly not on past performance.

Broadcasters are expected to make genuine commitments, the massive investments required to build organizations and provide responsive community service. They must have a reasonable expectation of license renewal.

Uncertainty and instability do not provide a positive environment for long term commitment and service.

If broadcasters have met their responsibilities, they should be free from comparison against untested competitors who offer nothing more than unsupported promises.

Thank you.

[The statement and questions follow:]

SECTION-BY-SECTION COMMENTS ON S. 1277

RENEWAL STANDARD (§§ 101–102)

These provisions suggest that renewal applicants would have to meet a "meritorious" programming standard separate from and in addition to the "responsive" programming standard. Post-Newsweek is willing for its stations to be evaluated under the responsive progamming standard, but the separate "meritorious" programming test provided for in this bill is vague and uncertain. It could lead to qualitative and subjective program review by a government agency, which would, in my judgment, be inconsistent with First Amendment values. The "responsive" programming standard, although not entirely free of these concerns, is directed more at subject matter than at content and quality, and therefore is less restrictive of free speech. It should be sufficient that a licensee's programming be responsive to local needs and interests.

Children's programming should not be subjected to a separate renewal standard, as proposed in the legislation. The general requirement of responsive programming, which is less intrusive into broadcasters' editorial judgment, is sufficient. Commercial braodcasting already provides substantial amounts of children's programming. In addition, there has been a burgeoning of other sources of children's programming, including cable, videotape and public television. Moreover, as the broader program marketplace continues to evolve, even the concept of children's television as a separate programming category is being overtaken by the more generic and more realistic concept of family television. We should not enact legislation that could discourage these innovative trends.

Post-Newsweek shares the concerns of most broadcasters who are troubled by the audit proposal. It is burdensome to broadcasters without benefit to the public; and it diverts the FCC's resources from more pressing matters. It is unnecessary because the public is capable of complaining to the FCC when it feels a licensee has not lived up to its public interest responsibility. Despite these misgivings, Post-Newsweek does not oppose an audit in principle if it is not unduly burdensome. But requiring each audited licensee to submit a month of records for each year of its five-year license term could produce quite a voluminous record. If the audit process is adopted, it would be preferable to direct the FCC, as the expert agency, to determine what program information should be required from the audited stations.

Post-Newsweek does not oppose a requirement to maintain records that reflect who a station has been responsive to its area's interest and concerns. But it is troubled by four aspects of the proposed legislation.

(1) The requirement should be confined to broadcast material that is responsive to area interests and concerns. (2) Preferably, however, it should not extend to each and every public service announcement, editorial and news or other program segment that is responsive. (3) The requirement should be limited to brief items of information and should not insist on lengthy descriptions. (4) Because of their volume, required records should not be kept in the station's public file but should be available to the public upon request, as were the program logs that stations had to maintain in the past.

As I understand it, the legislation would require licensees to air programming that responds to local interests and concerns, rather than local programming. The distinction is important. Let me give you an example. In all of our markets, drugs are a problem that our stations address in a number of ways. Local editorials, local

news coverage, local psa's, interviews with local leaders—all address this problem. But so does nonlocal programming, including programming that our four stations pool their resources to produce. Although such responsive programming would not qualify as "local" for any of our stations, it certainly should be counted.

The "responsive" programming standard is stated in terms of a station's service area. Our station in Hartford has a service area that, in technical terms, could be considered to encompass the outskirts of New York City and Boston, yet should not be evaluated on the basis of its responsiveness to the interests and concerns of those areas, since they are served by the New York and Boston stations. The statute's legislative history should make clear that a station's service area does not necessarily refer to its Grade B contour but to a more practical definition of the area whose interests and concerns it seeks to address.

A station should be able to cite its public service announcements as evidence of its responsiveness to area interests, though technically speaking they may not qualify as programming.

Though Post-Newsweek does not own radio stations, it does not believe it is appropriate or necessary to impose program renewal-audit or record-keeping obligations on radio stations. We are hopeful that the experience with radio will provide an adequate basis for doing away with program review of television station performance as well.

No renewal scheme should be adopted by the FCC or Congress that suggests ever-increasing quantitative standards. Nor should there be any predetermination that a fixed percentage of stations should fall below the renewal standard.

The FCC should administer the renewal process with flexibility. If the renewal standard is not met, for example, because of a station's financial straits or a principal's health problems, the FCC should take such factors into account. It should evaluate stations in different market circumstances differently. It should impose lesser sanctions—fines or short-term renewals—where they are more appropriate to the station's short-comings. With respect to rule violations, a station with an excellent record of public service could, for example, have one engineer in its employ who failed properly to enter required transmitter log readings or engaged in other FCC rule infractions. Such rule violations should not jeopardize the station's renewal application.

Limitations of financial settlement (§ 103).—Post-Newsweek supports this proposal.

Ownership stability (§ 201).—Post-Newsweek takes no position on the trafficking issue. While we are troubled by some aspects of the rapid turnover in our industry, some turnover has been positive.

Must-carry (§ 301).—Post-Newsweek vigorously supports elimination of the sunset requirement in the FCC's must-carry rules.

Diversification of ownership, tax certificates, distress sales (§§ 401 and 402).—These provisions constitute a stretch away from the comparative renewal issue, but Post-Newsweek supports the concepts and does not object to their inclusion in the legislation.

Multiple ownership (§ 403).—While Post-Newsweek believes the FCC has generally struck an appropriate balance in its multiple ownership rules, we would oppose their being codified in statute and thereby cast in concrete. They are highly technical and quite complex. For that reason alone the Commission should retain the flexibility to adjust them. In certain respects they may still be too restrictive. For example, the rules can bar common ownership of two television stations located as much as 120 miles apart on the ground that the two stations serve common coverage areas. That, in my judgment, is too limiting, and the FCC so found in the case of New York and Philadelphia in the Cap Cities/ABC transaction.

UHF/VHF swaps (§ 501).—Post-Newsweek strongly endorses the ban on educational VHF/commercial UHF swaps and urge the Congress to adopt this proposal.

Questions of Senator Inouye and the Answers

RENEWAL

Question. Members of the panel, am I correct that each of you believes there should be a public interest standard for broadcast licensees?

Answer. The Television Operators Caucus believes that television broadcasters must continue to have a public interest responsibility to present programming responsive to the needs and interests of their local viewers. It believes that this public

interest responsibility is good public policy, benefitting both broadcasters and their communities.

Question. Are you also in agreement that the Commission should consider whether a broadcaster has served the public interest before renewing the license?

Answer. The Caucus believes that if a broadcaster's past public service were not taken into account, the major factors remaining for comparing licensees to challengers would be diversity of ownership and integration of ownership with management. Under these criteria, an untried applicant could place an incumbent's license in serious jeopardy, no matter how good the incumbent's performance has been. This would distort incentives for good service and lead to damaging instability in the industry. We believe a past record of performance remains the best indicator of future service.

With regard to whether the FCC should be required to make an affirmative finding as to each renewal applicant that its broadcast performance over the past five or seven years has been sufficient to justify renewal, I can speak only for Post-Newsweek Stations. Such a requirement could drive the FCC to adopt, for the sake of administrative convenience, quantitative programming standards, which most of the industry vigorously opposes. Post-Newsweek would not object to reasonable quantitative standards or reasonable random audit procedures to monitor performance under the public service standard. Many broadcasters feel, however, that it is sufficient to rely on the public to raise complaints, that the FCC should presume sufficient broadcast performance absent serious public complaints, and that such presumption should be the basis for granting renewals.

Question. Can each of you state what you believe licensees should be required to demonstrate under the public interest standard?

Answer. Licensees should show that their programming has been responsive to the needs and interests of their viewing area, and that they have substantially complied with the Communications Act and FCC rules.

Question. Can the Commission determine whether a licensee has been serving the public without considering the station's programming?

Answer. I hope that some day Congress will conclude that the public interest is best served by not having a government agency review broadcaster programming. Until that day arrives, however, I believe the government should avoid subjective evaluation of programming quality. The standard of responsiveness to area interests at least provides an objective benchmark against which to measure programming. Post-Newsweek would also find reasonable quantitative standards to be acceptable, although we recognize that they are opposed by much of the industry. However, we would object to quantitative requirements in individual categories other than nonentertainment programming. Whatever the government's interest in guaranteeing a sufficient amount of public service programming, it does not extend to the content of that programming.

Question. Can you explain how a member of the public could demonstrate that licensee has not been serving the public under the Commission's present rules?

Answer. A member of the public could show that the renewal incumbent had been guilty of a pattern of serious rule violations such as political broadcast requirements or equal employment requirements. The quarterly lists of issue-responsive programming that a station is required to keep in its local public file might show, for example, a total failure on the station's part to deal with the views and concerns of a very substantial minority population in its service area. These lists plus stations' programming listings in local newspapers provide a wealth of information about stations' programming performance.

Question. Mr. Fritts and Mr. Chaseman, it is our understanding that although stations are not required to maintain programming records by the FCC, many still do so for business purposes and to protect themselves in the event of a renewal challenge. Is that true?

Answer. Post-Newsweek stations maintain programming logs to show when spots run in case advertisers ask questions and for other reasons. These logs are not particularly good sources of information about whether programs address local issues or needs. We also keep informal records about a good deal (but not all) of our issue-responsive programming. We use these records to prepare the quarterly issues-programs lists that we are required to maintain in our local public files. Records necessary to show that we had met the standards set forth in S. 1277 would be substantially more burdensome to maintain than our existing records. Post-Newsweek and a substantial number of TOC members are willing to maintain reasonable records that would provide the basis for the public and the FCC's evaluating their performance under a suitable renewal standard.

Question. Mr. Fritts and Mr. Chaseman, could you please respond to Mr. Geller's suggestion that the Commission establish percentage guidelines for television licensees in two areas: local and informational programming? Mr. Geller contends that this would eliminate subjectivity and uncertainty.

Answer. Post-Newsweek does not object to the principle of quantitative standards if those standards are reasonable and provide for adequate programming flexibility. It would object to a "local" program standard since the touchstone should be that the material responds to local and area interests and not where it was produced. Post-Newsweek would not object to a reasonable quantitative standard for informational or non-entertainment programming.

MULTIPLE OWNERSHIP

Question. Members of the panel, do you agree that the goal of the multiple ownership rules is to promote diversity?

Answer. We would agree that diversity is one of the goals of the multiple ownership rules, but the rules also properly attempt to strike a balance with other public interest goals. For example, group ownership often provides the basis for good public service performance. Diversity is only one factor to be taken into account in making decisions about what serves the public interest.

Question. In order to promote diversity, should we limit the number of stations that one entity can own or control in one market?

Answer. Post-Newsweek owns only television stations, and my answer is confined to television. As a general matter, no entity should own more than one television station in a metropolitan area. But the implementation of this principle has been too confining. The Commission's present duopoly rule can block common ownership of television stations in clearly separate markets that are 100 miles or more apart simply because the stations' signals overlap at the edges.

Question. When the Commission expanded its rules allowing station owners to hold 12 AM, 12 FM, and 12 TV stations, the FCC indicated that the local ownership restrictions would become more important to ensure diversity. Have there been any changes in the broadcast marketplace to indicate that those rules are less important today?

Answer. The principle behind the local ownership rules remains sound. Our suggestion for fine-tuning the television-to-television duopoly rule does not depend on any change in market conditions; we have always been critical of this application of the rule.

Question. Aside from the concern about the viability of AM stations, how would the public interest be served by the relaxation of the ownership rules?

Answer. Although this question was not addressed to me, I believe relaxation of the television-to-television duopoly rule to permit common ownership of stations in two distinct communities even if their signal contours overlap somewhat would create no meaningful reduction in local diversity. On the contrary, the public would be served by expanding the pool of good potential television operators in their local communities.

Senator FORD. Thank you, Mr. Chaseman.

Mr. Godfrey.

Mr. GODFREY. Thank you, Senator Ford, Senator Packwood.

My name is Ed Godfrey. I am news director of television station WAVE–TV in Louisville, KY. I might add that we are one of eight stations owned by Cosmos Broadcasting, which has its headquarters in Greenville, SC.

I welcome the opportunity to present my personal views on S. 1277.

Although the bill is designed in part to eliminate broadcasters' concerns about unjustified comparative license renewal hearings, parts of the bill are definitely not improvements.

Instead, they threaten to inject the FCC further into programming judgments that should be made by broadcasters. Most alarming are provisions which require the Commission to make findings as to whether the broadcaster's programming has been meritorious.

I would emphasize that the bill in this requirement would apply to all license renewal applications, not just comparative renewal proceedings.

Those provisions relating to meritorious programming are invitations, if not requirements, for the Commissioners to make subjective, case by case determinations of program worthiness—either that or regulations that specify amounts of certain types of programs. Either way, the editorial judgment of thousands of broadcast licensees would be curtailed without any assurance that five or fewer voting members of the Commission could make the correct determination of what is meritorious.

In addition to a requirement for meritorious programming overall, applicable to both radio and television stations, the bill's new provisions for deciding television renewal applications have additional requirements for meritorious programs, which point up the serious First Amendment issue here.

If so amended, the Communications Act would require the Commission to judge whether a television station's nonentertainment programs and children's programs were meritorious.

How do government officials go about making those decisions? How can anyone, in a democratic, pluralistic society decide for anyone but himself or herself what is meritorious? It is much safer for society to have professional journalists and program specialists at thousands of radio and television stations making those judgments in response to the demands of the audiences rather than to have a handful of government officials make those judgments based on their own views.

The possible reach of this legislation looks even more ominous when other provisions of the bill are examined.

The FCC is to decide whether broadcasters have responded enough to the concerns of residents, including through the coverage of local issues.

Broadcasters would have to maintain extensive records to document their determinations of issues of interest and the meritorious and responsive programming broadcasts.

In the final analysis, it's the FCC Commissioners who are to decide whether a given broadcaster has done enough. From the standpoint of a journalist, this kind of government control seems inconsistent with, if not repugnant to, the freedoms of speech and press enjoyed by other mass media, both older and newer technologies.

I hope the Subcommittee will not approve such an extensive scheme of program regulation.

Thank you.

Senator FORD. Thank you, Mr. Godfrey.

I am going to ask Senator Packwood to start the questioning.

Senator PACKWOOD. Mr. Fritts, in your testimony, you say, "Licensees may take into consideration the programming provided by other stations in the service area in developing such responsive material."

I'm not quite sure what that means. Can you elaborate.

Mr. FRITTS. I think originally, Senator, deregulation was begun with the idea that competition would replace regulation. As one looks toward what a broadcaster is required to broadcast in terms

of serving the community, he has a great deal of flexibility. Rather than have four stations in the same market doing news stories on the same issue, or public affairs programs on the same issue, at the same time, if that particular issue is being covered in the community, perhaps that station would be able to treat either that issue or other issues, and to treat them differently than the competitive stations would be doing.

Senator PACKWOOD. Do you mean if three of them were programming rock music, the licensee can say I'm going to program classical music, or good music, or something different, and that would be a fair standard?

Mr. FRITTS. I think it goes beyond entertainment programming. I think it actually goes to nonentertainment programming. But what is being broadcast in the total marketplace certainly can be considered as the broadcaster makes those value judgments as to what services they would provide to the community they represent.

Senator PACKWOOD. Mr. Geller, are you related to Simon Geller?

Mr. GELLER. No, no relation.

Poor schnook, he got renewed, though, Senator Packwood, if you remember.

Senator PACKWOOD. You've got some misgivings about "meritorious." As I read your testimony, you would like to see something more specific in the statute. Can you elaborate?

I don't know if I want something more specific, but I agree with you about "meritorious" being a mushy term.

Mr. GELLER. Not only is "meritorious" mushy, but, Senator, I was trying to point out that in the present statute "public interest" is mushy, and that is true if you go to a standard that is in S. 1277 or any other standard. They are all mush.

As Dean Burch said, they are marshmallow phrases. Unless you make them objective and effective, they're nothing. When Ed Godfrey says he doesn't like "meritorious," what does he like about the present one?

It's really an attack on the Communications Act and the entire public interest concept. I agree, you ought to implement that concept in a more objective way.

I say that what you ought to turn to is what you, the Congress, have specified—local service and informational service, and you ought to adopt reasonable standards in those two areas.

Senator PACKWOOD. Elaborate a little bit as to what you mean.

Mr. GELLER. Well, I would take a look at television in those two categories, local and informational, defined broadly. I would look at the stations in the top 50 markets. I would group them according to VHF or UHF. I would then group them according to network affiliate or independent. And then I would look and see where the median was and how they had functioned. I think the median is a pretty good indication of the public interest, and I would say that is what all of you have to render—somewhere clumped around the median. We don't have to argue about the precise details. But for the first time, a broadcaster would know that in local and informational, he has to devote 15 percent—and I make up the figure of 15 percent—that he has to devote 15 percent of his time to those categories.

They overlap, Senator, because obviously a local news program is also informational. And that would be the standard.

He would have discretion as to what programs to put on. But all I am following, as I say, is both your statute and the allocation scheme.

If a broadcaster in Baltimore put on no local programming, then the allocation scheme has been undermined in Baltimore. You didn't need to have 48 megahertz of spectrum space in Baltimore. You could have served it out of Washington or out of a satellite.

So what I am trying to do is make the statute effective for the first time and also objective.

What you have now is pure marshmallow, pure mush. The broadcasters like it that way because it's a 100 percent renewal. There is not a way it can be.

Senator PACKWOOD. I'm not quite sure what you're saying. I understand the top 50 markets. Within the 50 markets, you would then make a distinction between network affiliates and independents?

Mr. GELLER. Yes. I would make a distinction between independents, between UHF and VHF.

Senator PACKWOOD. And they would be held to statutorily different standards?

Mr. GELLER. They would be so held—and then I'd go on to markets 51 to 100, and markets then from 100 to 240.

Senator PACKWOOD. In the top 50, would you have a different standard for a network affiliate than for an independent?

Mr. GELLER. Yes.

Senator PACKWOOD. And a different standard for a UHF rather than a VHF?

Mr. GELLER. And I would take it right where the industry is—around the median.

I'm willing to accept that, and that was what was proposed in the FCC Docket 19154—look at what the industry is doing. Look at what the Joel Chaseman's are doing. They are rendering very good service. I don't want to get all broadcastors up that high. I would thus go below the Joe Chaseman and Post-Newsweek. Go to some median and say that's it.

It may mean, then, that 40 percent of them in that group have to come up to this standard, but they can do it, because they have been grouped accordingly. It's apples and apples. And then you would go on that way.

The standard would not increase. It would not keep on going up. That would be your standard. People would know they have to meet it.

And I think, for the first time, you would have an act that actually works.

Senator PACKWOOD. Let me switch over here. What would you do about radio?

Mr. GELLER. If you want to know, Senator, I would actually deregulate radio. Take one-half of 1 percent of the gross revenues and give it to public broadcasting.

But even with all those thousands of radio stations, if you want to continue regulating radio, which I think is a mistake, with 9,000, then I think all you can do is choose a figure for nonentertainment

of around 8 percent or 10 percent, and say it has to be met in 6:00 a.m. to midnight. In order not to endanger the good music station or the beautiful sound station, I would allow such stations, which cut down greatly on talk, to render only about 3 percent nonentertainment.

But I believe that the regulation of radio is not warranted.

Senator PACKWOOD. Obviously I agree with you.

I can think of few things more competitive, at least in 90 percent of the markets in this country, than radio. And the argument that people don't spin their dial I find facetious. They indeed do spin their dial.

Mr. GELLER. You have 39 stations in Washington, 59 in Chicago, 45 in New York. An argument might be made to regulate in very small communities, although there is easy entry. Radio is not expensive. The channels are available.

I would frankly deregulate.

I am not saying by that that the public interest is fully served by commercial radio. It is not. If you look for children's programming on commercial radio or in-depth coverage of the news or programming for the blind or cultural, you won't get that on commercial radio. You'll get it on public radio, and we are kind of starving it.

If you deregulate radio and took a very small sum, if you took 1 percent of gross revenues, you would get $60 million. If you took three-quarters of 1 percent, you would get $45 million. You would then give that to public radio and you would have a structure that works for you.

The broadcaster then would not have to come up for renewal. You could give him a 45 year lease. They are worried that the income tax started very low and then shot up. Put it in the lease that that is the figure for 45 years.

Senator PACKWOOD. I rather like some of your ideas, Mr. Geller.

Mr. Godfrey, if you had a meritorious statutory standard, tell me what you would do.

You know your license is coming up, and you had a seven year radio license, and a shorter television license. What would you do to program "meritoriously" so that you felt you would be safe at renewal time?

Mr. GODFREY. I'd program it very safely, Senator, trying to second guess those regulators who were going to determine what was "meritorious" and what was not. I could not say specifically what I would do, but I am sure in the outlining of such laws, the regulators would make it well known what might be the safe way to go.

There would be no controversial programming on a station as far as I'm concerned under "meritorious programming."

Senator PACKWOOD. For fear of provoking agitation and challenges that noncontroversial programming won't provoke?

Mr. GODFREY. Of course.

And Mr. Geller, I didn't say I like the present rules. I just don't like this one.

Senator PACKWOOD. Mr. Fritts.

Mr. FRITTS. Senator, if I could take issue with my friend, Mr. Geller. We agree on a number of things, and there are obviously a number of things on which we disagree. Quite frankly, I am afraid

his approach would take us back to the days of black and white television.

To apply percentage standards for nonentertainment programming, even if done by categories, is directly opposite to how the courts and the FCC have said broadcasters should proceed.

Currently, broadcasters put a quarterly issues-program list in their public inspection file. That identifies what they program for the public, and they make it available for public inspection. And they select and determine the issues which are important to their local community.

I think all of us agree that no two communities are alike, and it would be terrible to have the Federal Government attempting to superimpose, if you will, certain percentages.

We had that before and what did you have? You had all of the stations running public affairs programs at 4:00 o'clock on Sunday morning, saying that they have reached their percentage and now they can go on about their business.

That did not serve the public, and it certainly did not serve the stations' interest either.

We think that the approach should be that a licensee should broadcast material responsive to matters of concern to the residents of his or her local service area.

Senator PACKWOOD. My last question for the four of you is this. And let's start with Mr. Chaseman.

Have you seen any great evidence of greedy churning, sufficient to put in the three year limitation that this bill has?

Mr. CHASEMAN. What I've seen, Senator, is a balance. I have seen situations where stations were purchased even by people who were alleged to have only their financial interests in mind and improvements made in those stations. I've seen some others where it seemed to me that it was more a matter of price than of churning, that the price was so high that operations were affected because of the interest payments and so forth. We have seen one or two bankruptcies, I guess, in the business.

Senator PACKWOOD. You mean, even if purchased by "real broadcasters," they simply got themselves in so deep that they could not afford to run the station well.

Mr. CHASEMAN. "Real broadcasters" is a little bit like "meritorious" for me. I have trouble defining it.

Senator PACKWOOD. As opposed to straight financial investors, who know nothing about broadcasting.

Mr. CHASEMAN. As opposed to that, yes.

Senator PACKWOOD. Thank you.

Mr. Godfrey?

Mr. GODFREY. No, I have not seen any greedy churning, Senator, what I would term "churning" in the marketplace.

Senator PACKWOOD. Mr. Fritts?

Mr. FRITTS. I think one could cite two or three examples where nonbroadcasters, if I may use that term, have entered the business on a speculative basis. But, by and large, it has not been something that has been widespread in the industry, and it has been very isolated, as opposed to rule of the day.

Mr. CHASEMAN. Senator, if I could interrupt at this point, you asked a different question earlier that I was debating whether or not I wanted to jump in and respond to. If I may, I would like to.

It was the question you asked Eddie Fritts——

Senator PACKWOOD. Yes.

Mr. CHASEMAN [continuing]. About one kind of programming in the marketplace.

I can give you a case history that might sharpen it.

In the mid-sixties, I managed a station in New York that was WINS. It was a rock and roll radio station. I came to it from a whole other occupation, when I was with Westinghouse.

We were third, the station, when I took it over, was third among the rock and roll stations then active in New York, and that was not a recipe for long survival.

So we looked around the market. At that time, there were about 65 stations serving New York, or at least listed in the "Times," AM and FM. We decided that the only thing that would be not a mixture of music and news would be if we were to turn into an all news station, which was a considerable gamble by a group broadcaster, Westinghouse, because at that time there were no all news big city radio stations. There just wasn't anything like that. Gordon McClendon had tried one or two things in Tijuana, Mexico, but that was about it.

We did it because the marketplace was not working for us and because we thought it would work. We also knew that certain accolades would accrue to us if it worked successfully, but we weren't at all sure of that.

It looked a lot different, I've got to tell you, that all news radio in November-December, 1964, than it looks today.

We did turn it, on April 19, 1965, into an all news radio station, and other stations in the marketplace, which is partly responsive to your question, I think, other stations in the marketplace were affected by this and decided to cut back on their news since we became the reference point for news on the radio dial.

Had they been held to an artificially restrictive standard, whatever it might have been, it would not have served anyone because we did substantively change the marketplace by coming in as an all news radio station.

I think it is an example of one of the times—I am not necessarily a total marketplace advocate—but it is one of the times when the marketplace truly worked to give the American public something which we embrace—which is the Communications Act of 1934, Henry—because it talks about being responsive to the public interest, convenience, and necessity.

I think that is not a bad little anecdotal response to that question.

Senator PACKWOOD. What you're saying is that WINS was broadcasting—were you 24 hours a day?

Mr. CHASEMAN. Yes.

Senator PACKWOOD. It was broadcasting 24 hours of news, and for those who wanted news, they soon learned that WINS had news all day long.

Mr. CHASEMAN. Thank goodness.

Senator PACKWOOD. And that's where they would turn to get news.

Mr. CHASEMAN. Yes.

Senator PACKWOOD. That makes sense.

Mr. CHASEMAN. And that changed a lot of other stations which, up to that time, had more or less specialized in news, but were not willing to go all the way.

Mr. GELLER. Senator, on your trafficking issue, I have not made a study, but it seems to me it is bound to be militating against the public interest. A trafficker comes in and simply wants to build up the station for later resale. That's the definition of what you mean by trafficking.

The FCC now says that is fine. They have overruled the antitrafficking policy. They said if you can get this station to its highest valued use, it serves the public interest.

When you look at that, it is bound to dis-serve the public interest. If you are just in there to maximize your return, build up the station and get out, you are not going to put on worthwhile children's programming. You will lose money doing that.

When the FCC in 1974 adopted a Children's Television Statement, they said you have to put children first and profits second. When you go on to build up the station and get out, you're going to put on "Sabrina the Witch" or some cartoon, not a "Sesame Street" type program, not an age-specific program. The same thing is true in public affairs.

You will put on some kind of happy news thing that will get large ratings, and not a documentary.

So I think the whole policy that the Commission has adopted here, that the market always works, is crazy, and it is bound to rebound against the public interest. That is why you need to restore the policy that said, "No, broadcasters can't traffic."

There is a large difference in this industry between a KKR entering just for investment and then getting out, and Fox Television coming in for the long run, taking risks, pouring in a lot of money and saying, "We're going to do a first run syndicated program, we're going to try to build up a network."

I think that the Commission is encouraging a hell of a lot of people going in and out and not paying any attention to public trustee obligations.

Senator PACKWOOD. Thank you.

Mr. Chairman, I have no more questions.

Senator FORD. Thank you, Senator Packwood.

Let me ask a question or two.

Mr. Fritts, let me ask you this.

Can the Commission determine whether the licensee has been serving the public without considering the station's programming?

Mr. FRITTS. I think ultimately the Commission has to make some value judgment. We think the standard that we are proposing is the most minimally intrusive that one could expect to get relicensed under.

Senator FORD. But are you saying that they have to look at some station programming in order to make a judgment?

Mr. FRITTS. I think ultimately the Commission has to look at programming in terms of serving the needs of a community. That is how you serve the needs of the community, through programming.

But to set aside certain percentages is the wrong way to proceed in that area we believe.

Senator FORD. Let's look at this a little bit.

Explain to me how a member of the public could demonstrate that a licensee has not been serving the public under the Commission's present rules. Mr. Geller says that the incumbents always win. I kind of like that in politics, but I'm not sure about radio or television.

Mr. FRITTS. I think there are a number of ways. First, in most communities, if the public has concern about what is being broadcast, they will do one of two things. They will either contact the station personally or they will change the dial.

As you have heard, there are plenty of radio stations around the country and I would submit plenty of television stations, and the total marketplace includes cable television and the new independent stations, which have come on the air in recent times. We have a fully competitive environment in which broadcasters operate.

But, beyond that, if they did not get satisfaction at that point, they have two opportunities.

One is to file what is called a petition to deny, which simply says that the Commission will have to take a look at this licensee's performance under a microscope, if you will, to determine whether or not they should be renewed or whether they should be set for a hearing. In essence, have they served their public? The other process is what we are talking about today, the comparative renewal process, wherein they file an application to actually take over the frequency and facility that the station is currently operating on.

So we think the public would be protected because the petition to deny process, if the comparative renewal process were to be eliminated, would still remain.

Senator FORD. I don't believe I have any other questions.

Do you have any other questions, Senator Packwood?

Senator PACKWOOD. No, Mr. Chairman. Thank you.

Senator FORD. You all were mighty nice to come today and I appreciate your testimony. I look forward to working with you. Maybe we can find a piece of legislation that will be agreeable.

Our second panel will consist of James L. Winston, executive director and general counsel, National Association of Black Owned Broadcasters; and Marlene Belles, president, AWRT, KTVU-TV, in Oakland, CA.

Something happened to the television and all the networks when you, two, came on. It indicates that you don't own the big stations up here, where you have your own cameras to come and take your picture and put you on your stations.

How do you pronounce your name? Is it Ms. "Bellies" or "Bellees?"

Ms. BELLES. It's "Bell-es."

Senator FORD. All right.

Would you mind going first, please. We will ask you to proceed.

STATEMENTS OF MARLENE BELLES, PRESIDENT, AMERICAN WOMEN IN RADIO AND TELEVISION; AND JAMES L. WINSTON, EXECUTIVE DIRECTOR AND GENERAL COUNSEL, NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS

Ms. BELLES. Good afternoon, Mr. Chairman and members of the committee.

My name is Marlene Belles. I am the national president of American Women in Radio and Television.

AWRT is a nonprofit organization of several thousand professionals working in broadcasting, broadcast advertising, and closely allied fields.

Among the objectives of this organization are promoting the development and advancement of women in the electronic media and allied fields and improving the quality of radio and television.

AWRT appreciates this opportunity to comment on S. 1277, the Broadcast Improvements Act of 1987.

Since AWRT has not taken a position on the other provisions of S. 1277, I will limit my remarks to title IV, diversification in ownership of broadcast stations.

AWRT supports codification of policies designed to promote female and minority ownership of broadcast facilities.

AWRT believes that the preference policies created to increase diversity of media ownership are in the public interest.

Given the FCC's hostility toward the policies, legislative action is appropriate to maintain them.

While AWRT takes no position on other provisions of S. 1277, we believe that once women become broadcast licensees, there is no public interest reason to treat them differently than other licensees.

With your permission, Mr. Chairman, I would like to submit for the record AWRT's comments in the FCC's Preference Inquiry and summarize for you today some of the results of the studies we conducted and reported in those comments.

The results indicate that the Commission's preference policies have been effective and need to be maintained.

Further, we conclude that all policies, rather than just the comparative merit enhancement, should be extended to women, as provided in S. 1095, sponsored by Senator Lautenberg, and H.R. 293, sponsored by Congressman Leland, and H.R. 1090, sponsored by Congresswoman Collins.

I will now summarize some of the most relevant findings of our studies of female ownership and management which are presented on the accompanying charts.

In its first study, AWRT looked at ownership of radio and television station groups. Our research found that since 1978, station groups majority owned by females, have increased less than 1 percent, from a scant 3.4 percent to 4.3 percent.

In its second study of women in top broadcast management positions, AWRT found that women comprise only 6.1 percent of presidents, vice presidents, and general managers of television stations, while at radio stations women account for only 8.4 percent of the top managers.

When public television stations are excluded from the numbers, the number of top women managers at commercial television stations actually declined, from 6.1 percent in 1978, to 5.5 percent in 1987.

Women in all levels of management in television have increased from 22.3 percent in 1978, to 29.9 percent in 1987. Women radio managers increased from 21.4 percent to 30 percent.

AWRT's analysis indicates that, while women are gaining the initial skills and experience to move into top management positions, they are not yet reaching positions of real authority.

Some small progress has been made in creating the diversity of ownership of broadcast facilities required by the Communications Act. That objective has not been fully realized.

All available measures, including distress sales and tax certificates, should be brought to bear. Further, effective enforcement of the FCC's equal employment opportunity provisions is imperative.

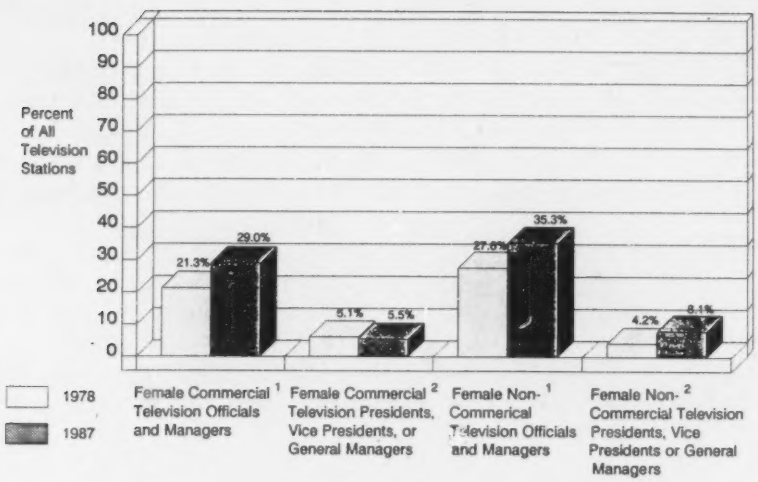
This committee's interest in a legislative solution to insure maintenance of policies that further the important public interest objective of diversity of broadcast ownership is commendable and most welcome by AWRT.

Thank you.

[The charts follow:]

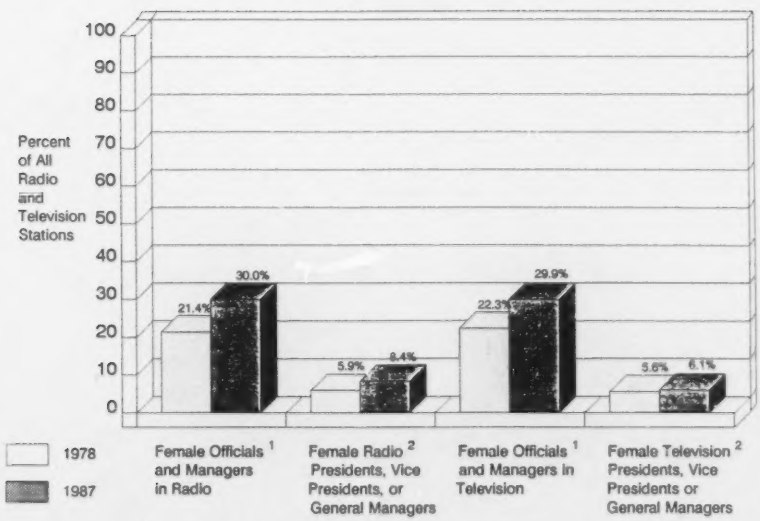
WOMEN IN TELEVISION MANAGEMENT

1978 AND 1987



WOMEN IN BROADCASTING MANAGEMENT

1978 AND 1987



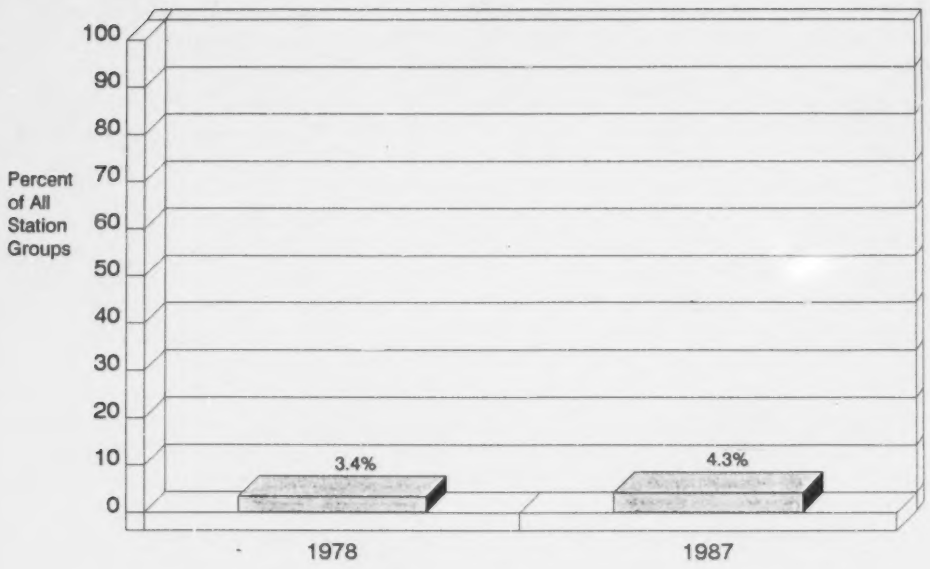
NOTES:

1. EEO Trend Report. Compiled from FCC records January 6, 1987. The definition of officials and managers includes presidents and other corporate officers, general managers, station managers, controllers, chief accountants, general counsels, chief engineers, facilities managers, sales managers, business managers, promotion directors, research directors, personnel managers, news directors, operations managers, production managers. It may also include those who direct individual departments or special phases of a firm's operations.

2. AWRT Survey of women in broadcasting management. Job titles included president, vice president and general manager. Data compiled in May 1987 from the 1978 and 1987 Broadcasting Yearbooks. See discussion in AWRT Comments in FCC MM Docket 86-484 for additional study parameters.

STATION GROUPS OWNED BY FEMALES

1978 and 1987



NOTE: AWRT survey of broadcast station group ownership. A female-owned station group is defined as a broadcasting group that is majority-owned by one or more women. Data compiled in May 1987 from the 1978 and 1987 Broadcasting Yearbooks. See discussion in AWRT Comments in FCC MM Docket 86-484 for additional study parameters.

Senator FORD. Thank you.

Mr. WINSTON. Good afternoon, Mr. Chairman and members of the subcommittee.

I am James Winston, executive director and general counsel of the National Association of Black Owned Broadcasters.

I would like to begin by expressing on behalf of NABOB our appreciation to the chairman and members of the subcommittee for convening this hearing.

I will confine my comments this afternoon to specific sections of S. 1277 on which we would like to focus the committee's attention.

We consider S. 1277 to be a very well conceived and thoughtful bill. We do not oppose any of the sections contained in the bill. In particular, we endorse and strongly support section 401 of the bill, which would codify section 309 of the Communications Act, the Commission's policy of awarding accredit in comparative hearings to members of minority groups who own or control an applicant and who will be integrated into the daily management of the broadcast station.

This policy has proven very productive in increasing the number of minority owners of broadcast facilities.

As the prices of broadcast stations have escalated in recent years, receiving a construction permit to build a new station has become the only means by which many prospective station owners can hope to achieve their ownership goals. In fact, of the last eight television stations which have been acquired by black owners since 1981, all but two were acquired through the comparative hearing process.

The prices of existing television stations have escalated so rapidly that television station ownership in the major markets, where the largest black populations reside, is out of reach for all but a few of the black owned companies.

Therefore, the enhancement credit for minorities in comparative hearings must be maintained to prevent minorities from being totally excluded from television station ownership and to continue the modest progress we have achieved in radio station ownership.

We also strongly support section 402 of the bill, which codifies the Commission's tax certificate and distress sale policies.

Given the apparent intention of the Federal Communications Commission to abolish these policies, along with the comparative hearing credit, it is imperative that the Congress preempt the Commission by codifying these policies prior to the conclusion of the Commission's rulemaking.

The tax certificate has been the most widely used of the Commission's minority ownership policies, and is the single most important factor which caused the significant growth of minority ownership of broadcast facilities since 1978. In virtually every purchase of a radio station or television station by a minority since 1978, the tax certificate has been a primary incentive, causing the seller to choose to sell the station to a minority purchaser.

Prior to 1978, minorities were rarely advised when the most desirable broadcast facilities were up for sale. The "old boy network" kept such information to itself.

The tax certificate policy encourages sellers to seek out minorities as possible purchasers of their stations. The result has been a growth in black ownership of radio stations from approximately 70 in 1978, to 140 in 1981, and 150 in 1987.

Similarly, the distress sale policy gave licensees an incentive to seek out minority purchasers. Deregulation has reduced the number of occasions since 1981 in which licensees have sought to take advantage of the distress sale policy.

Nevertheless, the distress sale policy continues to be an important aspect of the Commission's minority ownership policy, which should be preserved.

I would also like to comment on section 201 of the bill, which proposes to amend section 307 of the act, to reimpose the three year antitrafficking rule.

This is a controversial provision, and there is a difference of opinion among many broadcasters, including the members of NABOB, concerning this provision.

With the elimination of the three year rule, we saw companies begin to hold properties just long enough to turn them over for a profit. This led Commissioner Quello to testify very forcefully

before the House Subcommittee on Telecommunications and Finance on May 28, 1987, and again on Friday before this committee, for the reimposition of the 3-year rule.

We share Commissioner Quello's concern.

Therefore, we believe the exception recommended by Commissioner Quello, which you have already included in section 201 of your bill, is an excellent approach toward furthering two important Commission policies. By reimposing a 3-year rule and allowing an exception to the rule for a licensee who sells a station to a minority, S. 1277 promotes ownership stability and also promotes minority ownership by giving licensees who wish to sell early an incentive to seek out a minority purchaser.

This type of positive incentive plan has worked well in the tax certificate and distress sale areas, and it can be very productive in this area as well.

The only modification we propose for section 201 of the bill is to also allow an exception to the three year rule for minorities seeking to trade up. As I have mentioned previously, minorities have come into the station ownership arena very late, and many minority owners have been required to purchase left over, inferior, facilities, to get into ownership.

Many of these owners are able to add value to these stations and to sell them in order to move up to better quality facilities.

It is clear the ability of a broadcaster to serve the public interest is directly related to the technical quality of the facility he or she operates. Therefore, allowing minority broadcasters an exception to the 3-year rule, upon the condition that they trade up to another facility, would be a valuable addition to the legislation.

This completes my comments concerning the legislation. Thank you very much for this opportunity to present these comments.

[The statement follows:]

STATEMENT OF JAMES L. WINSTON

Good morning, Mr. Chairman and other members of the Subcommittee. I would like to begin by expressing on behalf of the National Association of Black Owned Broadcasters, ("NABOB") our appreciation to the Chairman and members of the Subcommittee for convening this hearing.

It has been a very long time since the Senate has held hearings to consider issues of concern to minority broadcasters. NABOB applauds your efforts and heartily endorses the direction the Committee is taking in S. 1277.

As you know, NABOB is a trade association representing the interests of the owners of the 150 Black owned radio stations and the 15 commercial television stations in America. NABOB was founded in 1976 to address a number of concerns which Black broadcasters discovered they had in common. As a result, NABOB established two principal goals for itself. The first is to increase the number of Black owned broadcast stations. We have found that as the number of Black owned stations increases the quality of service which we are able to provide to the public increases. For example, there are now two Black owned radio networks making it possible to achieve the economies of scale necessary to allow production of quality news and information programming. Second, NABOB seeks to improve the business climate in which Black station owners operate. To this end, we have attempted to change many practices within the advertising industry which discriminate against Black owned stations.

At a hearing chaired by Congresswoman Cardiss Collins held before the House Senate Subcommittee on Telecommunications on October 2, 1986, a panel of NABOB members testified concerning the range of problems with which we as Black broadcasters must contend, over and above those problems which all broadcasters must face. We presented testimony on the nature and types of discrimination to which we are subjected. For example, Black broadcasters are often excluded

from consideration in the placement of advertising by both national and local advertisers. The decisions to exclude Black owned and Black formatted stations are based upon stereotypical mistaken assessments of the Black consumer. Often, Black stations are excluded from advertising buys because of the assumption that the Black consumer has no discretionary income, has no control over business purchasing decisions and does not purchase upscale products.

For example, at the hearing in October, members of NABOB testified that the national advertising firm of Cunningham & Walsh issued a written request seeking radio stations with time available for advertising of Panasonic copiers. Written directly on the availability request was the statement "No Black/No Ethnic." I have attached to my testimony a copy of this request. The intention of this notation was to prevent station rep firms from proposing that any Black stations receive the Panasonic advertising, because the advertising agency assumed that Black listeners did not control the purchase of office copiers. Such an assumption is patently incorrect in many cities where Black people own a significant number of businesses and where Blacks are in management positions in many major corporations and in the government. Such availability requests are the 1987 equivalent to the signs which were once posted outside of employment offices which read, "Blacks need not apply."

While this is one of the most graphic examples of the discrimination and stereotyping to which Black owners of radio stations are subjected, it is by no means an unusual example. The uniqueness of this example is that such instructions were written down.

Blacks also face discrimination in the ability to finance broadcast properties. Most Black owners have described the frustration of attempting to finance station acquisitions and of being required to provide collateral and personal loan guarantees much more extensive than those required of non-minority purchasers. Indeed Black owners continue to experience such discrimination even after they have established track records and are in the process of purchasing third, fourth or fifth stations.

The discrimination and stereotyping to which Black station owners and prospective owners are subjected still exists in 1987 and, it is therefore, appropriate and important for this Subcommittee to address the measures proposed in S. 1277 to enhance the ownership of broadcast facilities by minorities.

S. 1277 does not include provisions designed to address all of the concerns described above. Indeed, it probably would be extremely difficult to design legislation to address all of these concerns, since some of them reflect vestiges of an attitude toward Blacks and other minorities left over from a bygone era. However, S. 1277 has addressed some of the concerns we discussed above and as to the issues it has addressed, it has proposed some very positive solutions.

As the Subcommittee is well aware, the Federal Communications Commission under the Reagan Administration has been engaged in an attack upon the FCC's minority ownership policies ever since 1981. Shortly, after taking office that year, the former Chairman of the FCC, Mark Fowler, made history by becoming the first member of the FCC to ever assert that the Commission's policy of awarding enhancement credit to minorities in comparative hearings should be abolished. In the case of Waters Broadcasting Company, in which a Black woman, Ms. Nancy Waters, received a construction permit for a new FM Station in Hart, Michigan, Chairman Fowler questioned the constitutionality of the minority enhancement credit which she received in the comparative hearing. It took several years for the Reagan Administration to pack the Commission with like-minded individuals. However, in 1986 the Commission was successful, in the case of *Steele* v. *FCC*, in formally adopting the Fowler position as the position of the full Commission. As a result, the Court of Appeals remanded the *Steele* case, as well as the *Shurberg* case (involving the Commission's distress sale Policy) and *Winter Park* case to the Commission. The Commission is now conducting a rulemaking in which it is allegedly reexamining the constitutionality of all of its minority enhancement policies: the tax certificate policy, the distress sale policy, and the comparative hearing enhancement credit. However, at the House hearing on October 2, 1986, three of the four current Commissioners clearly demonstrated that they have already prejudged these policies and view them as unconstitutional.

The enhancement credit in comparative hearings has been in effect for approximately thirteen years and the tax certificate and distress sale policies have been in effect for approximately nine years. The largest and most influential broadcast companies in America were established and grew to become corporate giants while *de jure* discrimination against Black Americans was the law in many states in this country, and where *de facto* discrimination against Blacks and other minorities persisted throughout the entire country. During these years, public opinion about

Blacks and other minorities was shaped by a media to which they had no access. Blacks and other minorities controlled no broadcast media through which they would make their views felt to the broader community or even exchange ideas among themselves. For a brief time now, over the last ten years, Blacks and other minorities have finally been given a window of opportunity. It is now possible, through Black radio networks, for news of interest to the Black community to be disseminated instantly across the country. It is possible in 165 different communities around the country for Black people to express their views on issues of concern to the local community through radio and television stations controlled by Black Americans. It is possible for an exchange of ideas by which non-minorities can receive the views of the minority community over the airwaves. Certainly, the gains have not been monumental. In many markets the Black owned facilities are the leftovers. They are the AM daytime stations which no one else wanted. Fortunately, in other markets we have seen Blacks obtain ownership of powerful FM stations and even some television stations. Unfortunately, all of these stations combined are less than two percent of all the radio and television stations licensed in the United States.

Therefore, S. 1277 is legislation which is greatly needed to continue the FCC's minority ownership policies. I will now comment on the specific sections of S. 1277 on which we would like to focus the Committee's attention.

We consider S. 1277 to be a very well conceived and thoughtful bill. We do not oppose any of the sections contained in the bill. In particular, we endorse and strongly support Section 401 of the bill which would codify at Section 309 of the Communications Act the Commission's policy of awarding a credit in comparative hearings to members of minority groups who own or control an applicant and who will be integrated into the daily management of the broadcast station. This policy has proven very productive in increasing the number of minority owners of broadcast facilities. As the prices of broadcast stations have escalated in recent years, receiving a construction permit to build a new station has become the only means by which many prospective station owners can hope to achieve their ownership goals. In fact, of the last eight television stations which have been acquired by Black owners since 1981, all but two were acquired through the comparative hearing process. The prices of existing television stations have escalated so rapidly that television station ownership in the major markets, where the largest Black populations reside, is out of reach for all but a few Black owned companies. Therefore, the enhancement credit for minorities in comparative hearings must be maintained to prevent minorities from being totally excluded from television station ownership and to the modest progress we have achieved in radio station ownership.

We also strongly support Section 402 of the bill which codifies the Commission's tax certificate and distress sale policies. Given the apparent intention of the Commission to abolish these policies, along with the comparative hearing credit, it is imperative that the Congress preempt the Commission by codifying these policies prior to the conclusion of the Commission's rulemaking. The tax certificate has been the most widely used of the Commission's minority ownership policies and is the single most important factor which caused the significant growth of minority ownership of broadcast facilities since 1978. In virtually every purchase of a radio station or televison station by a minority since 1978, the tax certificate has been a primary incentive causing the seller to choose to sell the station to a minority purchaser. Prior to 1978, minorities were rarely advised when the most desirable broadcast facilities were up for sale. The "old boy network" kept such information to itself. The tax certificate policy encourages sellers to seek out minorities as possible purchasers of their stations. The result has been a growth in Black ownership of radio stations from approximately 70 in 1978 to 140 in 1981 and 150 in 1987.

Similarly, the distress sale policy gave licensees an incentive to seek out minority purchasers. Deregulation has reduced the number of occasions since 1981 in which licensees have sought to take advantage of the distress sale policy. Nevertheless, the distress sale policy continues to be an important aspect of the Commission's minority ownership policy which should be preserved.

I would also like to comment on Section 201 of the bill which proposes to amend Section 307 of the Act to reimpose the three year antitrafficking rule. This is a controversial provision and there is a difference of opinion among many broadcasters, including the members of NABOB, concerning this provision. NABOB has consistently opposed many of the FCC's decisions designed to allow large financial interests to control and manipulate the ownership of large numbers of broadcast facilities. We opposed the increase in ownership limits from 7-7-7 to 12-12-12, and we currently have an appeal pending in the U.S. Court of Appeals for the D.C. Circuit challenging the legality of the FCC's decision to increase the ownership limits from

7-7-7 to 12-12-12. We opposed the increase in the ownership limits, because we saw this as a means for allowing the largest corporate owners of broadcast facilities to concentrate their control over broadcast facilities. Our fears proved correct, because shortly after the FCC implemented the 12-12-12 rule, we saw Capital Cities Communications acquire ABC, we saw GE acquire RCA, and we saw attempts to take over CBS, which resulted in an internal shift of control within CBS. This move toward the concerntration of control of more stations by fewer entities has been repeated down the line by large communications companies eager to go above the 7-7-7 limits.

Similarly, with the elimination of the three year rule, we saw companies begin to hold properties just long enough to turn them over for a profit. This led Commissioner Quello to testify very forcefully before the House Subcommittee on Telecommunications and Finance, on May 28, 1987, for reimposition of the three year rule. We share Commissioner Quello's concern. Therefore, we believe the exception recommended by Commissioner Quello which you have already included in Section 201 of your bill is an excellent approach toward furthering two important Commission policies. By reimposing the three year rule and allowing an exception to the rule for a licensee who sells his station to a minority, S. 1277 promotes ownership stability and also promotes minority ownership by giving licensees who wish to sell early an incentive to seek out a minority purchaser. This type of positive incentive plan has worked well in the tax certificate and distress sale areas, and it could be very productive in this instance also.

The only modification we would propose for Section 201 of the bill is to also allow an exception to the three year rule for minorities seeking to "trade-up." As I have mentioned previously, minorities have come into the station ownership arena very late and many minority owners have been required to purchase leftover, inferior facilities to get into ownership. Many of these owners are able to add value to these stations and to sell them in order to move up to better quality facilities. It is clear that the ability of a broadcaster to serve the public interest is directly related to the technical quality of the facility he or she operates. Therefore, allowing minority broadcasters an exception to the three year rule, upon the condition that they trade-up to another facility, would be a valuable addition to the legislation.

This completes my comments concerning the legislation. I would like to conclude my testimony by pointing out that some opponents of the minority ownership provisions contained in S. 1277 have suggested that the government should not establish policies designed to make minorities "rich." We agree. No one suggests that should be the government's role. However, the government does have an important role in assuring that minorities are accorded a means for expressing their views over the nation's airwaves. The licenses for the most powerful facilities for communicating ideas—VHF television stations, clear channel AM stations and Class B and C FM stations—were given out at a time when society still deliberately and systematically excluded minorities from the mainstream of American business, in general, and the communications industry in particular. All we seek now are some small steps to bring minorities into the mainstream so that our voices can be heard. Creating such opportunities for minorities is not only a permissible role for government, it is an essential one.

Thank you very much for the opportunity to present this testimony.

Senator FORD. Thank you.

Senator Packwood.

Senator PACKWOOD. Mr. Winston, I'm curious about the Cunningham and Walsh availability you submitted.

I notice it says, "Please do not submit black/ethnic or heavy teen stations.'

I assume on the heavy teen stations, the reason this company does not want to advertise is because they are selling office copiers and they don't assume that many teens are going to buy office copiers or are in a position to influence it.

Mr. WINSTON. That's correct, sir—a rather reasonable assumption.

Senator PACKWOOD. Tell me what kind of demographics you have that would listen to what is called a black station or an—well, let's take black to begin with? What kind of demographics on listenership is available for an advertiser so that he or she would think no,

that's the wrong demographics, or yes, that's the right demographics?

Mr. WINSTON. There are a variety of measurement services that measure the demographics of radio station audiences. Arbitron is the primary service being used by most ad agencies today. There is another company called Burch Reporting, which also measures radio audiences.

Of course, on the television side, you have Arbitron and Nielsen, both measuring television audiences.

The information available from those services can tell you the age groupings, broken down by many different breakdowns—18 to 34, male; 18–25 female; 25–45 female; et cetera. That information is available to all national ad agencies and most local ad agencies.

The problem is that that requires work. If you are going to go and look at the demographic data, you have to open a book and read it.

If your intent is to save time for yourself, then approaches to advertising, such as that exhibited by Cunningham and Walsh, become very routine. It saves a lot of time for people who, for various reasons, don't want to put in the time to research the markets.

That was certainly what was going on.

There was plenty of information available to Cunningham and Walsh to find out what black audiences were available and what the demographics of those audiences were.

Senator PACKWOOD. Would that information, Mr. Winston, show that there would be sufficient black managers or owners—I don't know how far down the management line you go before people don't make decisions about office copiers—but there would be enough to justify advertising on the principally black listened to radio stations?

Mr. WINSTON. Most definitely. The key, of course, is that that is not true of every black station in every market.

The point here is that you can't exclude them without looking at that data.

Senator PACKWOOD. You can't what?

Mr. WINSTON. You can't exclude them until you have looked at that data.

Senator PACKWOOD. Oh, I understand that, although you could apparently exclude it on teens without looking at any data. You just assume teens are not in any management position.

Mr. WINSTON. I think that is a fair assumption, yes.

Senator PACKWOOD. Thank you.

I think I have no more questions, Mr. Chairman.

Senator FORD. Fine. Thank you, Senator Packwood.

Mr. Winston, does your organization maintain any data on how long minorities and women hold stations after acquiring them?

Mr. WINSTON. We don't have any scientifically gathered data. Because we have such a small body of members—the total 165 stations represents approximately 100 different owners—so that in the position of executive director, I tend to know a great deal about the movement of owners in and out of ownership positions. Based upon my informal assessment of that information, the vast majority of station owners, black station owners, hold their stations well in excess of 3 years.

Senator FORD. In excess of three year

Mr. WINSTON. Well in excess of three years. Yes.

In fact, when we were discussing the NABOB position on the three year rule, one of the broadcasters, who was not in favor of supporting reimposition of the 3-year rule, was an owner who had held his stations for approximately ten years, who was just objecting because of personal concerns about over-regulation.

So, in terms of owners who might actually be taking advantage of the current elimination of the 3 year rule, there are very few who actually fit into that pattern.

Senator FORD. Can you tell me how many stations the Commission has licensed to minorities under the tax certificate and distress sale policies?

Mr. WINSTON. I have that information.

Fortunately, that is one of the few areas where the FCC still keeps good information, and I have gotten this information from the Small Business and Consumer Assistance Office at the FCC, which just recently did a retabulation of that information.

As of July 13, there had been 125 tax certificates since 1978, and 37 distress sales since 1978.

Senator FORD. Ms. Belles—I'm sorry, but I'm having a hard time with your name.

Does your organization have any data comparing the number of stations controlled by women as compared to the number of stations controlled by minorities?

Ms. BELLES. Unfortunately, we do not. Our organization covers a wide diversity of positions within the industry, and we have not compiled specific data on ownership. It has also been very difficult for us to get good information from the FCC. So we do not have it.

Senator FORD. I am anxious to get to this question, so I will go ahead and do it.

In the Steel Case, which challenged the constitutionality of the female preference, it was argued that while minority preference is constitutional, the female preference is not because women are not a protected class.

How do you argue against that?

Ms. BELLES. That women should be a protected class?

Senator FORD. No, no. That they should have the same preference. They argue that you were not a protected class.

Ms. BELLES. Well, I think it has been proven over the years that women have faced discrimination. I think the statistics that we presented here today show that there are very few women in ownership in management positions. I think the record speaks for itself, when you look at the EEO policies.

Senator FORD. Mr. Winston, does your organization believe that the tax certificate and distress sale policies should be expanded to include women?

Mr. WINSTON. Obviously, that is a sensitive issue because we would not like to come before the Senate and get into a quarrel with the women's groups, which we concede have experienced discrimination.

However, we believe that the——

Senator FORD. You ought to be on this side. You have to vote one way or the other when the time comes.

Mr. WINSTON. We believe the discrimination that minorities have experienced in this country has been of a very different magnitude, a very different type than that which women have experienced, and believe that there is some different treatment required in terms of addressing past discrimination.

Secondarily, we also believe that, in terms of enforcing policies designed to encourage increased ownership by women in the broadcast industry, there is a problem in terms of how you avoid the obvious potential for husbands to support applications on behalf of wives, and for the wives in some instances not to actually have an active role in the running of stations.

Finally, we are concerned that because you are talking about women who are a majority of the population, when you extend policies designed to increase ownership of broadcast facilities by minorities to a majority of the population, you have a very grave risk of diluting the policy to being nonproductive in its overall effect.

So, for these reasons, we would believe there is a distinction, a distinction which the FCC has drawn, and we think quite correctly, in that they have accorded comparative enhancement credits to women in comparative hearings, and we continue to support that which your bill does.

But we would question extending that policy into the tax certificate and distress sale policies area.

Senator FORD. Let me ask you both this question.

If this bill is passed, what steps can be taken to insure that the policy is not abused?

Ms. Belles, do you want to try that?

Ms. BELLES. There is, of course, always the potential for abuse in any policy.

When the milk is sour, you don't kill the cow. I think the best way to assure that is procedurally. It is not through the policy that we solve the problem; it is in instituting it and reviewing it and insuring that there is no sham in effect. I believe that is the issue we are speaking of here.

Senator FORD. I might say to you, being an old country boy, if the milk is bad coming from the cow, you try to straighten that out, too, don't you?

Mr. Winston.

Mr. WINSTON. I believe I agree there, that the solution to avoiding abuse of the policy is through procedural mechanisms where those procedural mechanisms could be effective. Certainly with respect to minorities, if there are other organizations or other individuals who are taking a role in a minority application, which would tend to suggest that those people are actually in control of the application, they are generally fairly easy to identify.

The FCC has very effective procedures in place right now, which it, in some instances, may not have used. But the policies are certainly there and the procedures are there, in place, to allow them to investigate quite thoroughly any application which comes before them in terms of determining who actually has control of the application.

Let me just point out that with respect to minority applications, that concern has been one that has been very limited in terms of areas where that would likely be a problem. The vast majority of

the companies which have taken advantage of the tax certificate and distress sale policies have been 100 percent minority owned. So the potential for abuse has not been there.

Senator FORD. Bob, do you have any more questions?

Senator PACKWOOD. Just one last question, if the witnesses would not mind if I changed subjects.

You heard the previous panel address themselves to the issue of meritorious in terms of relicensing. I would be curious if either of you would like to comment on that standard as a licensing standard.

Ms. Belles?

Ms. BELLES. As an organization, AWRT has not taken a position in any of those areas. While I have personal opinions, I would prefer not to comment today.

Senator PACKWOOD. Mr. Winston?

Mr. WINSTON. We have not taken a detailed analysis of that provision. However, we have gone on record as supporting the bill, as it is currently structured. I think we might propose some revisions and some specific language in that regard.

However, we have found that minority broadcasters, black broadcasters, whose experience I can speak to directly, have not found license challenges to be a problem.

Minority broadcasters tend to come into the market labeled as being expected to serve the minority community. The minority community comes to the owners when they move into the market and makes its views very clear on those points. Therefore, you see the vast majority of black broadcasters providing programming of a black format, geared toward the black audience.

The information I have seen shows that about 85 percent of the stations that black owners own provide a black formatted programming; so that we find that the audience dictates that black broadcasters be responsive to the black community.

Consequently, whether the renewal standard has been one of public trustee, you know, serving the public interest, or a new one, which would gear toward meritorious programming, our members feel fairly confident that they can meet that standard.

Senator PACKWOOD. You probably broadcast the same thing in either—you are basically broadcasting to the market now, and you were saying there was a market there that was not being served and black owners are serving it.

Mr. WINSTON. Correct.

Senator PACKWOOD. Let me congratulate you both on the quality of your written statements and your oral statements. It is very helpful to have specific information, and both of you had very specific information that I found helpful.

Ms. BELLES. Thank you.

Senator PACKWOOD. Thank you, Mr. Chairman.

Senator FORD. Thank you, Senator.

I have no further questions.

We thank you both for being here today

This hearing is recessed or adjourned, whichever is proper.

[Whereupon, at 3:10 p.m., the hearing was concluded.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

FRIEDMAN, LEEDS, SHORENSTEIN & ARMENAKIS,
New York, NY, July 20, 1987.

TONI COOKS,
Counsel, Senate Subcommittee on Communications,
U.S. Senate, Washington, DC.

DEAR MS. COOKS: The purpose of this letter is to formally request that the enclosed *Comments* of James U. Steele be made a part of the record in connection with consideration of the Broadcast Improvements Act of 1987 (S–1277). Mr. Steele addresses the issue of codification of preferences for females in broadcast licensing, preferences which, he submits, are antithetical to his constitutional rights under the equal protection clause of the U.S. Constitution. Mr. Steele regrests that he was not afforded an opportunity to testify at the hearing on this proposed legislation. Thank you for your assistance in associating the enclosed *Comments* with the Record.

Very truly yours,

STUART A. SHORENSTEIN.

Enclosure.[1]

STATEMENT OF THE LEAGUE OF LATIN AMERICAN CITIZENS, NATIONAL ASSOCIATION OF BLACK OWNED BUSINESSES, NATIONAL BLACK MEDIA COALITION, NATIONAL CONFERENCE OF BLACK LAWYERS, COMMUNICATIONS TASK FORCE, NATIONAL URBAN LEAGUE, NATIVE AMERICAN SATELLITE NETWORK, INC., AND THE UNITED CHURCH OF CHRIST

We unanimously support Title IV of the "Broadcasting Improvements Act of 1987" (S. 1277), and respectfully solicit your approval of this section of the legislation which would enhance the diversification of programming and ownership in the broadcasting industry. The bill merely serves to codify three programs at the Federal Communications Commission that have been in existence for nearly a decade.

Since the FCC instituted several program initiatives in 1978 to promote minority ownership, the number of minority-owned broadcast stations has risen considerably, from 60 to more than 250. It seems that the FCC is now determined to reverse this trend in spite of the fact that the 250 minority-controlled stations represent a mere 2% of all broadcasting stations nationwide.

The distress sale policy was developed by the FCC to provide a marketplace approach for reducing time-consuming comparative hearings designated against radio and television licensees and to promote competition and diversity in broadcasting. Under this policy, a broadcaster facing the loss of its license can sell its station to a qualified minority applicant at a price less than fair market value. Since the adoption of the policy thirty-seven distress sales have been completed.

An owner of a media property that sells it to a minority can defer paying tax on the capital gains by receiving a tax certificate. The issuance of tax certificates as result of FCC-approved transaction is yet another voluntary private sector initiative to encourage minority representation, and has resulted in over 120 new minority stations.

Another of the FCC programs awards credit to minority or female applicants during FCC comparative license hearings. The FCC's comparative hearing process for new stations should include merit for minority-and female-controlled companies, just as a minority or female candidate receives special consideration when applying for private or public sector employment or a seat in medical school. A substantial number of television and radio stations have been awarded to females and minorities based on the comparative credit this policy affords such applicants.

After many years of implementing all three incentive policies, the FCC has done an about-face and concluded that these programs are constitutionally suspect. A Notice of Inquiry is currently being conducted to examine these policies. This rever-

[1] The enclosure was not reproducible.

sal comes at a time when the Supreme Court seems to be endorsing federal and private affirmative action programs. Also, it is important to note that both the House and Senate have determined that preference given to minorities and females in lottery decisions involving low power television should be incorporated into FCC policy. In its report Congress stated "[t]he nexus between diversity of media ownership and diversity of programming sources has been repeatedly recognized by both the [FCC] and the courts." H.R. CONF. REP. NO. 765, 97th Cong., 2d Sess. (1982). S. 1277 is consistent with these findings.

In sum, minority and female ownership is in the public interest because it will yield a greater diversity of viewpoints for the general public. If Title IV of S. 1277 is codified, female and minority participation in the broadcast marketplace will continue to grow and thus spark a more competitive and creative climate. Therefore, we encourage your support of the minority and female incentive provisions in S. 1277.

Thank you for your attention and consideration.

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

August 7, 1987

Senator Daniel K. Inouye
Chairman, Subcommittee on Communications
Committee on Commerce, Science
and Transportation
SD-508 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

This is to furnish the views of the Department of Justice on S. 1277, the "Broadcasting Improvements Act of 1987," a bill to amend the Communications Act of 1934. We regret that the Subcommittee would not permit the Department of Justice to testify on S. 1277, despite our repeated requests to do so. We request that our views, as expressed herein, be included in the record. Because we believe the bill offends the requirements of the First Amendment and employs racial and gender preferences contrary to the Equal Protection component of the Due Process clause of the Fifth Amendment, we strongly oppose its enactment, and if enacted, will recommend presidential disapproval.

Several provisions of this bill pose a serious threat to constitutionally-protected free speech. First, this bill would require the Federal Communications Commission (hereafter "FCC" or "Commission") to permit a licensee to renew its broadcast license only after it had proved that its programming, "as a whole, has been meritorious and has responded to the interests and concerns of the residents in its service area, including through the coverage of issues of local importance." Section 101(a). A television licensee, in addition, would have to demonstrate that its "nonentertainment programming and the programming directed towards children" has similarly been "meritorious." Id. Ten percent of all television applications for renewal would be selected randomly each year to ensure that they meet the established criteria. Id.

The bill instructs the Commission to eliminate the sunset provision of mandatory carriage rules that, notwithstanding their effect on the freedom of speech, require cable systems to carry local television stations. Section 301(a). The bill also prohibits the Commission from eliminating or altering its rules which limit multiple ownership of radio and television stations by one entity or individual. Section 403.

In addition, Title IV of the bill mandates certain racial and gender preferences in granting authorization to construct and

operate broadcast stations for which there is more than one applicant. Section 401. Relatedly, the bill prohibits the Commission from changing its current policy of awarding tax certificates for the sale of broadcast facilities, or its policy of permitting distress sales, to entities controlled by one or more members of a minority group. Section 401. We turn first to the First Amendment issues.[1]

I. First Amendment Objections

In our view, Titles I and III of S. 1277 raise serious First Amendment concerns. Recognizing that balancing the concerns of the First Amendment with government regulation of the electromagnetic spectrum is an enormously complex issue, we nevertheless believe that the provisions of this bill are contrary to the First Amendment.

The history of broadcast regulation is well known and need not be rehearsed here at great length, but a brief overview may be helpful in putting into context the First Amendment concerns raised by Titles I and III of S. 1277. In the early days of radio, as one commentator has put it,

> [c]haos rode the airwaves, pandemonium filled every loudspeaker and the twentieth century Tower of Babel was made in the image of the antenna towers of some thousand broadcasters who, like Kilkenny cats, were about to eat each other up.

E. Barnouw, Tower of Babel 31 (1966). Or, as Justice Frankfurter said more succintly, "[w]ith everybody on the air, nobody could be heard." National Broadcasting Company v. United States, 319 U.S. 190, 212 (1943).

To resolve this problem, Congress enacted the Radio Act of 1927 which, among other things, established the Federal Radio Commission and gave it the power to regulate radio for the "public interest, convenience and necessity," Pub. L. No. 69-632, 44 Stat. 1162. Significantly, the Act also prohibited censorship and infringement of the right of free speech. Nevertheless, by affording broad regulatory powers to the Federal Radio Commission, and later to the Federal Communications Commission, Congress was writing into law the tension inherent in the very notion of government regulation of a medium of expression.

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[1] We do not here address in detail the proposed prohibition on the limitation or elimination of the Commission's multiple ownership rules. These rules have traditionally been justified on both First Amendment and competitive grounds. FCC v. National Cizizens Committee for Broadcasting, 436 U.S. 775, 795 (1978)("Our previous decisions have recognized . . . that the First Amendment and antitrust values underlying the Commission's diversification policy may properly be considered in determining

That tension was carried forward into the Communications Act of 1934.

Thereafter, the Commission was faced with two choices: it could allocate licenses based on objective factors only, or it could delve into licensees' operations in fulfillment of its mandate to serve the "public interest." Focusing on the broad powers afforded it under the public interest standard, the Commission chose to act as far more than merely a "traffic officer." And the Supreme Court agreed with the Commission's view of its role:

> The [Radio] Act itself establishes that the Commission's powers are not limited to engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with one another. But the Act does not restrict the Commission merely to the supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing among the many who apply. And since Congress could not itself do th it committed the task to the Commission.
> . . . The Commission's licensing function cannot merely be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of "public interest" were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation by radio [sic], comparative considerations as to the services to be rendered have governed the application of the standard of "public interest, convenience, and necessity."[citation omitted]

National Broadcasting Company, 319 U.S. 215-17.

The Commission used its powers to impose content requirements on broadcasters that would plainly have been prohibited if imposed on other media. For example, for years the Commission required broadcasters to ascertain the needs of their local community, cover issues of local interest, and originate a certain amount of programming locally. 47 C.F.R. 73.1120(b)(2) (1980). The Commission also required television licensees to devote certain amounts of time to news, public affairs and other nonentertainment programming. 47 C.F.R. 0.281(a)(8)(i) (1981).

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[1] (Cont.) where the public interest lies."). See note 17, infra.

Certain of these requirements still exist, albeit in somewhat reduced forms.[2]

These regulations, and others like it, were upheld in National Broadcasting Company, and have been upheld since, against the contention that they infringe on broadcasters' First Amendment rights.[3] The basis for those decisions has not changed in more than forty years:

> If [the First Amendment invalidated the regulations], it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio is inherently not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to government regulation.

Id. at 226.

These "differences in character" have been used to justify the application of a different First Amendment standard to broadcasting than is applied to the print media. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). In Red Lion, the leading case in this area, the Supreme Court held that the so-called

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[2] In 1981, the Commission eliminated many of these restrictions on radio licensees. Deregulation of Radio, 84 F.C.C.2d 968 (1981). In 1984, the Commission significantly modified the rules applying to television licensees. In the Matter of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076 (1984) (hereinafter "Deregulation of Television"). The justification for modification of the rules in each of those proceedings was that "market incentives will ensure the presentation of programming that responds to community needs and provide sufficient incentives for licensees to become and remain aware of the needs and problems of their communities." Id. at 1077. See Deregulation of Radio, 84 F.C.C.2d at 1007. Nevertheless, the Commission expressly stated in Deregulation of Television that it did not "imply that the programming obligations of broadcast licensees, as we have historically viewed them, are not properly subject to review and revision in appropriate circumstances." 98 F.C.C.2d at 1077 n.2.

[3] See, e.g., Nat'l Ass'n of Indep. Tel. Producers & Distribs v. FCC, 516 F.2d 526 (2d Cir.1975); Nat'l Ass'n of Indep. Tel. Producers & Distribs. v. FCC, 502 F.2d 249 (2d Cir. 1974); Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971); Goldberg & Couzens, "Peculiar Characteristics": An Analysis of the First Amendment Implications of Broadcast Regulation, 31 Fed.

"fairness doctrine"--which required broadcasters to "afford reasonable opportunity for the discussion of conflicting views on issues of public importance," 47 C.F.R. 73.1910--was constitutionally permissible, but not required. The Court based its decision on the inherent scarcity of usable radio frequencies, which compelled the government to institute a licensing scheme to make the medium available for public use. The Court there evinced a willingness, however, to reconsider its decision. It said, "if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications." 395 U.S. at 393. Since then, the Court has noted that the scarcity rationale underlying Red Lion has become increasingly suspect in recent years, and that the decision remains subject to reconsideration. FCC v. League of Women Voters, 468 U.S. 364, 376-379 nn.11-12. However, the Court thus far has declined to undertake such a reconsideration until it received "some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." Id. at 377 n.11.

The President recently vetoed a bill that would have enacted the so-called fairness doctrine into public law. In his veto message, the President heartily endorsed the FCC's factual determination that changed conditions have rendered Red Lion's rationale obsolete.[4] The President stated that "[i]t may now be fairly concluded that the growth in the number available of media outlets does indeed outweigh whatever justifications may have seemed to exist at the period during which the [Red Lion] doctrine was developed." Veto Message of the President of June 20, 1987. The President also argued that Red Lion itself was decided incorrectly in that the Supreme Court did not there consider the existence and accessibility of media other than broadcasting adequately to inform the public:

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[3] (Cont.) Comm.L.J. 1 (1978).

[4] In that report, the FCC further suggested that the doctrine was unconstitutional. In re Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143 (1985) (hereinafter "FCC Report"). The Commission did not declare the fairness doctrine unconstitutional out of deference to the Supreme Court's special role in making constitutional decisions. But the Report did say that "in light of the substantial increase in the number and types of information sources, we believe that the artificial mechanism of interjecting the government into an affirmative role overseeing the content of speech is unnecessary to vindicate the interest of the public in obtaining access to the marketplace of ideas. Were the balance ours alone to strike, the fairness doctrine would thus fall short of promoting those interests necessary to uphold its constitutionality."

> Quite apart from these technological advances, we must not ignore the obvious intent of the First Amendment, which is to promote vigorous public debate and a diversity of viewpoints in the public forum as a whole, not in any particular medium, let alone in any particular journalistic outlet. History has shown that the dangers of an overly timid or biased press cannot be averted through bureaucratic regulation, but only through the freedom and competition that the First Amendment sought to guarantee.

Id.[5]

S. 1277 would require the Commission to return to the extensive content review of broadcaster programming from which it has retreated in recent years, in part because of First Amendment concerns. Deregulation of Television, 98 F.C.C. at 1089. That such a review is a content-based restriction on speech is a truism: the whole point of giving the FCC the power to review licensees' programming is to enable the Commission to decide whether the content of that programming is "meritorious." Such an intrusive, content-based restriction can survive only if the Supreme Court's decision in Red Lion still stands. Yet in Red Lion, the Supreme Court realized full well that it was not speaking for the ages, and expressly conditioned its constitutional argument on a determination of the facts as they then existed.

Present facts establish that the scarcity of available broadcast outlets used to justify the content-based regulations traditionally imposed by the FCC and upheld by the courts no longer exists. As such, these regulations must be subjected to the same scrutiny used to analyze regulation of other media. Under that standard, the requirements of S. 1277 cannot withstand constitutional scrutiny.

In addition, we concur with the view articulated by the President in vetoing the fairness doctrine, that content-based restrictions are antagonistic to the First Amendment. Red Lion itself was based upon an unfounded assumption. The First Amend-

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[4] (Cont.) Id. at 156.

[5] As noted above, the Supreme Court has stated its willingness to reconsider Red Lion upon "some signal from the FCC or Congress." FCC v. League of Women Voters, 468 U.S. at 377 n.11. At the time the Court decided League of Women Voters, the FCC had already proposed to abandon the fairness doctrine regulations. Id. at 378-79 n.12. We think that in waiting for a signal from "Congress," the Court was in reality referring to the legislative process. The legislative process has run its course with respect to the fairness doctrine, and it has not been enacted into law. It may well be, therefore, that recent events have further increased the likelihood that the Supreme Court will reconsider the

ment is directed at removing government impediments to vigorous public debate in the public forum as a whole, not just in one media outlet.

In either case, whether the rationale underlying Red Lion no longer applies or whether Red Lion itself was decided upon a faulty premise, the content-based provisions of S. 1277 must now be subjected to the same strict scrutiny applied to other federal statutes seeking to restrict the First Amendment rights of non-broadcast media. Under that scrutiny, only a compelling government interest could possibly justify the kind of oversight S. 1277 would require. Merely stating, as the FCC has, that review of a licensee's programming is necessary to determine whether that licensee is discharging its duty to the public is not sufficient. Moreover, the type of intrusive government interference that would be authorized by S.1277 is not proper under the First Amendment, even when fairness or diversity of viewpoint is the objective. "The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."[6] Buckley v. Valeo, 424 U.S. 48-49 (1976).

Nor does the need for some "traffic" or technological regulation justify S. 1277's content-based regulation.

> First Amendment complaints against FCC regulation of content are not adequately answered by mere recitation of the technically imposed necessity for some regulation and the conclusory propositions that "the public owns the airwaves" and that the broadcasting license is a "revocable privilege."

Banzhaf v. FCC, 405 F.2d 1082, 1100 (D.C. Cir. 1968) (emphasis in original) (footnotes omitted). There are far less restrictive alternatives to comprehensive government review of licensees' programming to determine if it is "meritorious;" there are other ways for the Commission to allocate licenses in a manner which would avoid the cacophony that might attend a complete lack of regulation.

The overbreadth of the provisions of Titles I and III of S. 1277 is further illustrated by the view traditionally taken of this kind of content-based regulation outside the broadcast context. For example, in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974), the Court struck down a statute requiring a newspaper to grant equal space to a political

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[5] (Cont.) Red Lion decision at its next opportunity.

[6] See also, Police Department of Chicago v. Moseley, 408 U.S. 92, 95 (1972), in which the Court stated: "[A]bove all else, the First Amendment means that government has not power to restrict expression because of its message, its ideas, its subject matter,

candidate to reply to criticism and attacks on his record. The restriction "constituted the compulsion by government on a newspaper to print that which it would not otherwise print." 418 U.S. at 256. This was impermissible, the Court said, because

> [a] newspaper is more than a passive receptacle or conduit for news, comment, and advertising [footnote omitted]. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and the treatment of public issues and public officials--whether fair or unfair--constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

418 U.S. at 258. S. 1277 mandates precisely that which the First Amendment seeks to avoid: government oversight of the choices licensees make about what to broadcast and what not to broadcast.[7]

Moreover, the chilling effect of the kinds of requirements contained in S. 1277 demonstrate the reason why they are fundamentally antagonistic to free speech. The FCC Report chronicles in impressive detail the effect on broadcasters of the FCC's power to refuse to renew their licenses. FCC Report, 102 F.C.C.2d at 159-190. Fearing an unsatisfactory FCC response to controversial programming, many broadcasters simply avoided presenting such programming. As the FCC said in its report, quoting Judge Bazelon, "[w]hen the right to continue to operate a lucrative broadcast facility turns on periodic government approval, even a governmental 'raised eyebrow' can send otherwise intrepid entrepreneurs running for the cover of conformity."[8] Broadcasters, like newspapers, must be free to exercise independent editorial judgment. That judgment is severely re-

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[6] (Cont.) or its content."

[7] Significantly, in Tornillo, the Supreme Court rejected the argument that the actual scarcity of the print media justified a content-based regulation. It has been empirically established that the actual scarcity of print outlets is, in fact, far more severe than the physical scarcity presented by the electromagnetic spectrum. See Senate Committee on Commerce, Science, and Transportation: Print and Electronic Media: The Case for First Amendment Parity, S. Print 98-50, 98th Cong., 1st Sess. 56-69 (1983). If the more severe scarcity of print outlets did not justify the content-based restrictions in Tornillo, neither should the less severe scarcity of broadcast outlets justify the regulations of Title I of S. 1277.

[8] FCC Report, 102 F.C.C 2d at 162-163, quoting D. Bazelon, The First Amendment and the New Media -- New Directions in Regulating

stricted by government oversight which subjectively evaluates the "merits" of a licensee's programming.[9]

Because of similar concerns, the Department opposes enactment of Title III of S. 1277, which would eliminate the five-year sunset provision placed by the FCC on its so-called "must-carry" rules requiring cablecasters to carry qualified local broadcasters on their systems. Since 1962, the FCC has imposed mandatory carriage rules of one kind or another on cablecasters. In general, these rules have required cablecasters, upon request, to carry any "local" broadcast signal, as defined by the Commission's rules. The applicability of these rules was quite broad: cablecasters were required to carry every local or significantly viewed signal irrespective of the number of must-carry channels being transmitted, the channel capacity of a cable system, or the degree of programming duplication. The Commission's stated purpose in so regulating cable was to fulfill its mandate to protect free, community-oriented television.

The Supreme Court has never confronted a direct challenge to the constitutional validity of must-carry rules.[10] However, in a unanimous opinion, the United States Court of Appeals for the District of Columbia Circuit recently held that the Commission's must-carry rules could not withstand scrutiny under the First Amendment. Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied. sub. nom., National Assoc. of Broadcasters v. Quincy Cable TV, Inc., 106 S.Ct. 2889 (1986).

Subsequent to that decision, the Commission received numerous petitions for rulemaking asking it to adopt new must-carry

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[8] (Cont.) Telecommunications, 31 Fed. Comm. L. J. 201, 207 (1979).

[9] We do not suggest, however, that all restrictions on broadcasters' speech are in all ways equal to that of print for First Amendment purposes. To withstand scrutiny under the First Amendment, regulations should be based on the "peculiar characteristics" of the broadcast medium. National Association of Independent Television Producers and Distributors v. FCC, 516 F.2d 526, 531 (2d Cir. 1975). For example, the broadcasting medium has a special ability to deliver messages during military emergencies or natural disasters. Requiring broadcasters to cooperate in the Emergency Broadcast System and to carry certain messages would presumably not present the same constitutional problems posed by Title I of S. 1277.

[10] See generally Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1438-1445 (D.C. Cir. 1985), cert. denied sub. nom. National Association of Broadcasters v. Quincy Cable TV, Inc., 106 S.Ct. 2889 (1986) (discussing the history of FCC regulation of cable, the must-carry rules and constitutional challenges to those rules).

rules that would meet the Quincy court's constitutional concerns. In response to these petitions, the Commission adopted a new regulatory program.[11] The first part of that program would require cable systems to offer to subscribers input selector switches for use with their antennas. These switches would allow subscribers to choose between over-the-air signals and the signals of cablecasters. Cablecasters would also be required to make cable subscribers aware of the need to retain the capacity directly to receive over-the-air signals even once connected to the local cablecaster. Second, the Commission instituted interim must-carry rules scheduled to expire five years from their effective date.

The constitutionality of the rules this bill would make permanent is now in issue before the D.C. Circuit.[12] For this reason alone, we believe it to be unwise for Congress to enact the rules into law. Furthermore, the D.C. Circuit's decision in Quincy casts serious doubt on the constitutionality of permanent must-carry rules.

In Quincy, the court recognized that "the 'scarcity rationale' has no place in evaluating government regulation of cable television," and applied the same standard to regulation of cable that is applied to other media.

> The First Amendment theory espoused in National Broadcasting Co. and reaffirmed in Red Lion cannot be directly applied to cable television since an essential precondition of that theory -- physical interference and scarcity requiring an umpiring role for government -- is absent . . . ."

Quincy, 768 F.2d at 1449, quoting Home Box Office v. F.C.C., 567 F.2d 9, 45 (D.C. Cir.) (per curiam), cert. denied, 434 U.S. 829 (1977).

Ordinarily, a threshold issue under the First Amendment is whether the relevant regulation should be subjected to the stringent standard employed by the Supreme Court in Miami Herald Publishing Company v. Tornillo, 418 U.S. 241 (1974), or to the balancing test used in United States v. O'Brien, 391 U.S. 367

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11 In the Matter of Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, Report and Order, 1 F.C.C. Record 864 (released November 28, 1986), modified in part, 62 Rad. Reg. 2d (P & F) 1251 (1987).

12 Turner Broadcasting Systems, Inc., et al. v. Federal Communications Commission and United States, Nos. 86-1682/1683 (D.C. Cir.).

(1968), for "incidental" burdens on speech.[13] To the Quincy court, however, the must-carry regulations as written were so "clearly impermissible" even under the lesser O'Brien standard that the court declined to decide definitively whether a more exacting standard need be applied. Quincy, 768 F.2d at 1454. The interest the Commission had advanced to justify its must-carry rules was that the rules were needed to "protect[] local broadcasting," id. at 1458. Simply put, the Quincy court found that the Commission had "failed adequately to demonstrate that an unregulated cable industry poses a serious threat to local broadcasting and, more particularly, that the must-carry rules in fact serve to alleviate that threat." Id. at 1459.

Like the Quincy court, we need not resolve the issue whether permanent must-carry rules should be assessed under the standard applied in Miami Herald v. Tornillo or that applied in O'Brien. In part the resolution of that issue would depend upon the legitimacy of the justification advanced for such rules, and in part it would depend on breadth of the actual rules. However, even assuming that the goal is legitimate and that must-carry rules are content-neutral, we are concerned that permanent must-carry rules may not be sufficiently narrow to withstand scrutiny under the O'Brien test.

As an empirical, as well as a constitutional matter, we doubt that a nexus between the goal of maximizing programming choices to consumers -- a justification that has been advanced to support their imposition -- and permanent nation-wide must-carry rules could be established to our satisfaction. To do so, we would have to be convinced that cable subscribers would not demand -- and that cablecasters would not supply -- local broadcasting signals in the absence of the must-carry rules. We would further have to be convinced that the existence of local broadcasting would be imperiled without permanent must-carry rules, and that the demise of these local broadcasters would diminish the diversity of programming available to consumers. Comments of the United States Department of Justice In Re: Amendment of Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, Docket No. 85-349, at 17-20 (January 30, 1986)("Comments Of Justice"). This assumption provides the traditional basis for must-carry rules, but has never been empirically proven. Quincy, 768 F.2d at 1459, quoting Inquiry into the Economic Relationship Between Broadcasting and Cable Television, 71 F.C.C.2d 632, 634 (1979). As long as that assumption remains open to question, the constitutionality of permanent must-carry rules under any level of First Amendment scrutiny is open to serious question.

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[13] Certainly this was the choice facing the Quincy court. 768 F.2d at 1450. We do not here express an opinion on the effect of the Supreme Court's decision in City of Renton v. Playtime Theatres, Inc., 106 S.Ct. 925 (1986) on this analysis.

Removing the limit on the duration of must-carry rules would also make it that much harder to justify their breadth under the First Amendment. As this Department said to the Commission during the course of its last must-carry proceedings, any rules that did not distinguish between those broadcasters who might fail in the absence of mandatory carriage and those who would survive might be overbroad. Supplemental Comments of the United States Department of Justice in 85-349, at 12 (April 25, 1986). Furthermore, we noted that

> [e]ven where access regulation may be beneficial, rules that mandate carriage of all local channels without compensation to the cable system will generally be an excessive remedy. Any carriage regulation imposed by the Commission should be directed at those local markets where access problems are likely to be severe and should be tailored in response to specific determinations of need.

Comments of Justice, supra, at 4. The must-carry rules this bill would make permanent would apply nation-wide, and do not differentiate between the preservation of local broadcasting and the financial success or failure of individual local stations. Comments of Justice, supra, at 20. We therefore do not believe these rules are sufficiently narrow in scope to justify their enactment into law.

Overall, there is little doubt that must-carry rules are highly intrusive.

> The rules coerce speech; they require the operator to carry the signals of local broadcasters regardless of their content and irrespective of whether the operator considers them appropriate programming for the community it serves. The difficulty is not so much that the rules force operators to act as a mouthpiece for ideological perspectives they do not share, see Wooley v. Maynard, 430 U.S. 705, 714 (1977), although such a result is by no means implausible [footnote omitted]. The more certain injury stems from the substantial limitations the rules work on the operator's broad discretion to select the programming it offers its subscribers. See Miami Herald v. Tornillo, supra, 418 U.S. 241 (recognizing First Amendment protection of editorial discretion).

Quincy, 768 F.2d at 1452. The federal interest necessary to justify such intrusive rules would have to be far more specific than that of the "public interest" or of "maximizing the video

programming choices available to consumers."[14] The First Amendment prohibits governmental restrictions on the speech of its citizens; it is not a guarantee, except indirectly, that as many people as possible will be exposed to as many opinions and as much information as possible. It embodies a judgment that the public interest is not best served by restricting the right of expression of some in order to expand the expressive rights of others. Whatever the objectives of permanent must-carry rules, in trying to achieve them the speech of cablecasters is restricted.[15] Such an approach is "wholly foreign to the First Amendment."

Certainly rules of this kind would be unconstitutional if applied to newspapers, even if they did not specify the exact content of the message a newspaper was required to print. As noted in the discussion of Title I above, the regulation challenged in Miami Herald v. Tornillo required newspapers to grant a right of reply to political candidates attacked in earlier editions. The Court's discussion, however, applied not only to such right-of-reply statutes, but to all "enforceable right[s] of access," Miami Herald, 418 U.S. at 254. As the Quincy court stated:

> Indeed, if Miami Herald supplies the appropriate mode of First Amendment analysis, our inquiry would be at an end without any need for testing the rules against the other O'Brien factors or applying any form of interest-

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[14] The former justification is the general one in the Communications Act of 1934; the latter a justification advanced by the Commission to justify its must-carry rules. First Report and Order, 1 F.C.C. Record at 879. In light of the Quincy decision, it also bears mentioning that whether the articulation of a new justification for rules previously held unconstitutional can serve to change the scrutiny to which they are subjected is a highly complex and controversial constitutional question. See, e.g., Edwards v. Aquillard, No.85-1513, at 2 (U.S. Sup.Ct. June 19, 1987)(Scalia, J., dissenting)("[T]he question of [the Act's] constitutionality cannot rightly be disposed of at a gallop, by impugning the motives of its supporters."). It can be argued that the justification advanced for the rules at issue in Quincy -- that of protecting local broadcasters -- is essentially the same as that of maximizing programming diversity. Programming choice is only adversely affected by the absence of must-carry rules if local broadcasting is at risk without such rules, for the only interest they serve is to ensure that local broadcast signals are carried by cablecasters. As we note above, this nexus has never been empirically established, and the failure to do so undermines any analysis seeking to support must-carry rules. See also, Quincy, 768 F.2d at 1459.

[15] Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) ("the concept that government may restrict the speech of some elements of society in

> balancing. In Miami Herald . . . [w]ithout so much as alluding to even the possibility of a subordinating governmental interest, the Court invalidated the statute. Forcing an editor to print that which he otherwise would not, the Court held, was a restraint the First Amendment simply would not tolerate. The result would be no different, the Court took pains to note, even if it could be shown that complying with the statute would cause the newspaper to suffer no additional costs.

Quincy Cable, 768 F.2d at 1453 citing Miami Herald, 418 U.S. at 258. Thus, if permanent must-carry rules are analogized to a requirement that a newspaper devote a specified amount of space to local news, the degree of intrusiveness -- and the treatment that they would be accorded under Miami Herald -- is made much clearer.[16] Again to quote the Quincy court, such rules "favor one group of speakers over another," and severely impinge on editorial discretion." Id.

As noted above, the issue of the constitutionality of the must-carry rules the bill would make permanent is now before the D.C. Circuit.[17] Sensitive to this review and the problems must-carry rules pose in light of the First Amendment, the Commission chose to continue these rules in effect for a limited period of time. By removing the limit on the rules' duration, S. 1277 upsets the balance struck by the Commission itself in seeking to promulgate must-carry rules that meet the constitutional concerns of the Quincy court. Given the shadow of unconstitutionality looming over permanent must-carry rules, for Congress to act now to repeal the sunset provision of the Commission's current rules is most unwise. For if the rules were subject to constitutional

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[15] (Cont.) order to enhance the relative voice of others is wholly foreign to the First Amendment.").

[16] The aptness of this analogy is demonstrated by the D.C. Circuit's opinion in Quincy. In finding that the scarcity rationale of Red Lion did not apply to cable television, the Quincy court was following the dictates of the Supreme Court in rejecting "the suggestion that purely economic constraints on the number of voices available in a given community" -- even if they result in an actual scarcity of outlets -- "justify otherwise unwarranted intrusions into First Amendment rights." Quincy Cable, 768 F.2d at 1450, citing Miami Herald v. Tornillo, 418 U.S. 256 (1974). And as the Quincy court noted, "[w]hile Miami Herald involved the conventional press . . . as this court has had prior occasion to observe, there is no meaningful 'distinction between cable television and newspapers on this point.'" Id., quoting Home Box Office, Inc. v. FCC, 567 F.2d at 46.

[17] Turner Broadcasting Systems, Inc., et. al. v. Federal Communications Commission and United States, Nos. 86-1682/1683

question before, elimination of the five-year sunset provision makes them quite clearly unconstitutional.[18]

For the foregoing reasons, we strongly recommend against enactment of Titles I and III of this legislation and would advise the President to disapprove it if enacted by the Congress. Certainly, that would be our recommendation.

II. Equal Protection Objections

Turning now to Title IV, the Department vigorously opposes the enactment of Title IV of S. 1277 as well. Section 401(a) of this Title would require the Federal Communications Commission to grant "a substantial enhancement credit" in comparative licensing proceedings to an applicant owned or controlled by women who will be integrated into the applicant's daily management. Section 401(a) also would require a "greater" credit to be given to any applicant owned or controlled by one or more members of a minority group who will be integrated into daily management. In effect, these provisions codify the existing Commission practice of awarding race -and gender-based preferences.[19]

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[17] (Cont.) (D.C.Cir.).

[18] Because we are convinced that First Amendment concerns are by themselves sufficiently substantial to warrant our recommendation against passage of Title III of this bill, we follow the lead of the Quincy court and do not address the Fifth Amendment problems with the bill. Quincy, 768 F.2d at 1447 n. 27. We note, however, that much of what we have said about the lack of a nexus between the justifications traditionally articulated for must-carry rules and the substance of such rules might well apply in the context of a Fifth amendment claim as well. See Nollan v. California Coastal Commission, No. 86-133, slip op. at 8 (U.S. Sup. Ct. June 26, 1987) quoting Penn Central Transportation Co. v. New York City, 438 U.S. 104, 127 (1978)("a use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose").

[19] Beginning with the decision in TV 9, Inc. v. F.C.C., 495 F.2d 929 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974), the Commission began to award a preference for race in the comparative licensing process, although it had previously argued that such a practice was unconstitutional. In a later Court of Appeals case, Garrett v. F.C.C., 513 F.2d 1056 (D.C. Cir. 1975), the Commission argued unsuccessfully that a preference should be rewarded for race only if the applicant could demonstrate a link between the race of its owner/operators and increased diversity of content; the court, however, held that it was not necessary to demonstrate such an empirical connection. Pursuant to this judge-made policy, the Commission has given preferential treatment to certain groups whom it has designated as "minorities," including Aleuts, American Eskimos, American Indians, Asian Americans, Blacks, and persons with Hispanic surnames. See

Section 402 of the bill would codify the Commission's current tax certification and distress sales policies, which create preferences for broadcasting entities owned or controlled by members of designated minority groups.[20] In our view, these racial and gender preferences, currently under review by the

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[19] (Cont.) Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 980 n.8 (1978). We know of no rational basis whatever for the selection of precisely these racial groups. See Fullilove v. Klutznick, 448 U.S. 448, 537 (1980)(Stevens, J., dissenting)). Prior to the adoption of a race-conscious scheme, the Commission had contemplated following neutral principles in awarding licenses. See Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965); Chapman Radio and Television Co., 19 F.C.C.2d 157, 183 (1969).

The Commission's scheme of gender preferences originated in a Review Board decision in Gainesville Media, Inc., 70 F.C.C.2d 143, 149 (Rev. Bd. 1978), which reversed both longstanding Commission policy and the decision of the same Review Board in the same case only a few months before, see Gainesville Media, Inc., 70 F.C.C.2d 58, 66 (Rev. Bd. 1978). The Commission itself did not give plenary consideration to the gender preference policy; and a panel of the Court of Appeals for the District of Columbia Circuit ruled that the policy was invalid, since "it simply is not reasonable to expect that granting preferences to women will increase programming diversity. Women transcend ethnic, religious and other cultural barriers." Steele v. F.C.C., 770 F.2d 1192 (D.C. Cir. 1985). (Subsequently, in an order released on October 31, 1985, the Court vacated this opinion; and after receiving a brief from the Commission, which expressed doubt as to the legality of both the racial and gender preferences, the Court remanded the case to the Commission by order released October 9, 1986).

[20] In certain cases the Commission permits "distress sales" of stations to applicants deemed to be minority-owned or controlled. Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d at 983. Further, the Commission presently uses its authority under 28 U.S.C. 1071 to grant tax certificates in certain conditions to licensees who sell their stations to minority-owned or controlled purchasers. The tax certificate permits the seller--which may, of course, not be minority controlled--to defer capital gains tax on any gains realized in this transaction. For purposes of both preferences, the Commission now deems an applicant to be minority controlled "where the general partner, or partners, owns more than 20 percent of the broadcasting entity and is a member, or members, of a minority group." Minority Ownership in Broadcasting, 92 F.C.C.2d 849, 855 (1982). Previously, the Commission had followed the rule that a 50% minority interest was required to establish control. See id. at 853.

Commission, [21] are clearly unconstitutional.

We begin with the question of the constitutionality of the bill's racial preference. The Equal Protection component of the Due Process clause of the Fifth Amendment prohibits the Federal government--and thus the Federal Communications Commission--from discriminating on the basis of race in awarding broadcasting licenses. [22] See Bolling v. Sharpe, 347 U.S. 497, 499 (1954). To the extent that the federal government might be constitutionally permitted to take account of race in awarding such licenses, it could only do so as a carefully tailored remedial measure designed to redress past discrimination by the governmental unit involved -- that is to say, the Federal Communications Commission itself. See Wygant v. Jackson Bd. of Educ., 106 S. Ct. at 1847 (plurality opinion); id. at 1854 (O'Connor, J., concurring). But far from supplying the absolutely indispensable predicate of past discrimination, the record of the Commission's practices, so far as we are acquainted with it, demonstrates that that agency has not been a discriminator. On the contrary, the Commission's record of nondiscrimination against minorities appears to be very good.

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[21] We note that the validity of the use of such preferences in comparative licensing, distress sales and tax certificates is currently the subject of a rulemaking proceeding which the Commission undertook pursuant to the order of the Court of Appeals for the District of Columbia circuit. See Steel v. F.C.C., No. 84-1176, supra, (D.C. Cir., ordered remanded October 9, 1986); Shurburg Broadcasting Co. of Hartford, Inc. v. F.C.C., No. 84-1600 (D.C. Cir., ordered remanded Jan. 23, 1987); "Notice of Inquiry: In the Matter of Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Considerations," 52 Fed. Reg. 596 (Jan 7, 1987). We urge the Committee not to act on this bill, which in essence codifies the very policies the Commission is currently engaged in reviewing, until the Commission reports its findings. Any action at an earlier stage could frustrate the Commission's effort to create a detailed, factual record of the empirical effects of the preferences.

[22] Nothing in the Supreme Court's decision this term in Johnson v. Transportation Agency, Santa Clara County, 55 U.S.L.W. 4379 (U.S. Mar. 25, 1987), is to the contrary. Johnson was expressly decided solely on statutory grounds, and did not reach any constitutional questions of the kind pointedly raised by S. 1277. The majority opinion by Justice Brennan stated that " we do not regard as identical the constraints of Title VII [of the Civil Rights Act of 1964] and the federal constitution on voluntarily adopted affirmative action plans." Id. at 4384. The most recent Supreme Court decision relevant to the issues raised by this bill is Wygant v. Jackson Bd. of Educ., ___U.S.___, 106 S. Ct. 1842 (1986). See Johnson, 55 U.S.L.W. at 4389.

Almost four decades ago, the Commission received evidence in a comparative licensing proceeding that was intended to show the unfitness of an applicant because of its bias against blacks. See WNBX Broadcasting Co., Inc., 12 F.C.C. 805, 811 (1948). Although that evidence was held not to prove the alleged bias, the Commission nevertheless denied the challenged applicant a license, while awarding a license to a competing applicant, the International Ladies Garment Workers Union, which boasted a "membership . . . representative of various races, creeds, and national origins," id. at 823, 832-834. Furthermore, in its basic Policy Statement on Comparative Broadcast Hearings, supra, the Commission established nondiscriminatory licensing procedures. See also Chapman Radio and Television Co., 19 F.C.C.2d at 183. The 1965 Policy Statement also envisaged that applicants proposing specialized programming services aimed at minorities could compete successfully against applicants offering more general programming. See 1 F.C.C.2d at 397 n. 9. The Commission considered specialized programming for minorities to be in the public interest where a need for such programming was shown and where the applicant's proposals would meet that need. See La Fiesta Broadcasting Co, 6 F.C.C.2d 65, 67 (Rev. Bd. 1965) (awarding license to applicant who proposed only Spanish-language broadcasting for Lubbock, Texas area); see also Herbert Muschel, 33 F.C.C. 37 (1962); Salter Broadcasting Co., 8 F.C.C.2d 1036 (Rev. Bd. 1967); Hawaiian Paradise Park Co., 6 F.C.C.2d 65 (Rev. Bd. 1966). There is no doubt whatever that the Commission has for decades been sensitive to minority concerns, and has taken minority interests into account in deciding how to allocate licenses. Indeed, the only clear racial discrimination the Commission has engaged in, so far as we know, has been its consistent discrimination against nonminorities over the past fourteen years when, against its own better judgment and under court order, it enforced a race-conscious preference policy. See TV 9 Inc. v. F.C.C., 495 F.2d 929.

It appears that the bill, like the Commission policies which it codifies, is intended to have the non-"remedial" purpose of promoting diversity of viewpoint and porgramming content by causing greater diffusion of ownership. Promoting such diversity is, of course, a longstanding goal of the Commission's policy. See Policy Statement on Comparative Broadcast Hearings, supra, 1 F.C.C.2d at 394-395; West Michigan Broadcasting Co. v. F.C.C., 735 F.2d 601 (D.C. Cir. 1984). But two contentious assumptions underlie the use of racial preferences to promote such diversity. First, it needs to be assumed that the race of the owner/operator of a broadcasting outlet will significantly influence his or her programming choices. Second, it also needs to be assumed that only a person of a particular race or gender can provide programming of interest to, or addressing concerns raised by members of the same race or gender in the community. Both assumptions are unfounded.

There is absolutely no reason to think that a broadcaster's race must dictate the format of his or her programming. "A

prediction based on a racial characteristic is not necessarily more reliable than a prediction based on some other group characteristic." Mobile v. Bolden, 446 U.S. 5, 88 (1980) (Stevens, J., concurring in judgment). To assume that Black, White, Asian or Hispanic broadcasters, merely because of their race, will tend to favor certain types of programs or will bring a special viewpoint to their coverage, is to engage in crude stereotyping. See Steele v. F.C.C., 770 F.2d at 1198. Past experience has shown clearly that members of one racial group are perfectly capable of making programming decisions that meet the preferences of audiences largely composed of members of another racial group. See Herbert Muschel, 33 F.C.C.2d 37. Moreover, to regard race as the determinant of programming choices is to assume that entrepreneurs in the highly competitive telecommunications industry are insensitive to audience demands. Finally, even if an owner's racial characteristics did underlie his or her broadcasting decisions, the proposed scheme of preferences would still generate absurd results; it would, for example, require awarding licenses to a Black-owned applicant that proposed to operate in a largely Asian environment, or to an Asian-owned applicant in a predominantly Black listening area. But if race determines the choice of programming formats, these licensees should have had no preference over nonminority applicants for the same outlets; an Asian applicant would ex hypothesi be no better suited to Black listeners than a Caucasian applicant.

It might be argued, following Justice Powell's lead in University of California Bd. of Regents v. Bakke, 438 U.S. 265 (1978), that a government-ordained racial preference can be a legitimate "plus factor" that will promote a healthy diversity in broadcasting, just as it was supposed to be one of the factors which the University of California could consider in exposing its medical students to educationally important diversities. See Bakke, 438 U.S. at 317-318. But this misses the point. See Johnson, 55 U.S.L.W. at 4395 (Scalia, J., dissenting). Moreover, Justice Powell's acceptance of a "plus" for race turned on characteristics unique to higher education: diversity in a student body is an inherently compelling governmental interest because students encounter and learn from one another, and the academic freedom of institutions of higher education, derived from the First Amendment, entitles them to great latitude in choosing their student bodies, Bakke, 438 U.S. at 312 (opinion of Powell, J.).

There is no inherent value, however, in a racially diverse body of station-owners, since the race of the owner does not dictate programming choices, and since there are other nondiscriminatory means of assuring diverse contents in broadcasting. Moreover, there is no First Amendment governmental interest in selecting owners on the basis of racial factors.

The constitutional principle of race neutrality, which we are defending here, has very deep roots. That principle was stated forcefully by the Supreme Court as long ago as 1896: "the

Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race." Gibson v. Mississippi, 162 U.S. 565, 591 (1896). Justice Harlan, in his famous dissent in Plessy v. Ferguson, 163 U.S. 537 (1896), warned against the divisive consequences that would follow from restoring the color line to our legal system: "[t]he sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States without regard to race." Id. at 559-560. The Fourteenth Amendment's command to treat individuals as individuals, not as mere components of racial blocs, was emphasized by Chief Justice Hughes, writing for the Court in Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 351 (1938). Chief Justice Stone wrote for the Court in Hirabayashi v. United States, 320 U.S. 81, 100 (1943) that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be denial of equal protection."[23] Chief Justice Vinson, writing for the Court, reaffirmed that the Fourteenth Amendment protects personal, not group, entitlements. See Shelley v. Kraemer, 334 U.S. 1, 22 (1948); see also Sweatt v. Painter, 339 U.S. 629, 635 (1950). In Bolling v. Sharpe, 347 U.S. at 499, Chief Justice Warren wrote for the Court that legalized racial classifications "are contrary to our traditions and hence constitutionally suspect." Chief Justice Burger's opinion for the Court in Palmore v. Sidoti, 466 U.S. 429, 432 (1984) repeated the fundamental principle that legalized racial classifications are subject to "the most exacting scrutiny." The wheel had come full circle from Plessy v. Ferguson when the second Justice Harlan could write that "[f]ew principles are more firmly stitched into our constitutional fabric than the proposition that a State must not discriminate against a person because of his race." Adickes v. Kress & Co., 398 U.S. 144, 151 (1970).

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[23] A renowned civil libertarian, Justice Murphy, also wrote an opinion in the Hirabayashi case that deserves to be recalled. "Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals. They are at variance with the principles for which we are now waging war. We cannot close our eyes to the fact that for centuries the Old World has been torn by racial and religious conflicts and has suffered the worst kind of anguish because of inequality of treatment for different groups. There was one law for one and a different law for another. Nothing is written more firmly into our law than the compact of the Plymouth voyagers to have just and equal laws." Hirabayashi, 320 U.S. at 110-111. In Hirabayashi and the cases connected with it, however, the Supreme Court "solemnly accepted and gave the prestige of its support to dangerous racial myths."

The proposed legislation violates the constitutional norm of equal protection in at least three ways.

First, by denying license applicants the right to be considered solely on their own personal merits, without regard to their race or origin, it deprives them of the equal opportunity to pursue a lawful occupation. The Government cannot constitutionally "deny to lawful inhabitants, because of their race . . . the ordinary means of earning a living. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom that it was the purpose of the [Fourteenth] Amendment to secure." Truax v. Raich, 239 U.S. 33, 41 (1915); cf. Examining Board v. Flore de Otero, 426 U.S. 572 (1976) (commonwealth may not deny civil engineering license on grounds of alienage alone).

Second, it contradicts the principle that race cannot be a criterion for enjoying favored access to a facility which the government controls. Access to the airwaves depends on obtaining a governmental license issued selectively to some but no all applicants under the Commission's licensing procedures. It is no more constitutional to impair an individual's access to this facility because of his or her race than it would be constitutional to deny that individual the right or access to a public education for racial reasons, see Brown v. Board of Education, 347 U.S. 483 (1954). "The Fourteenth Amendment commands the State to provide the members of all races with equal access to the public facilities it owns or manages, and the right of a citizen to use those facilities without discrimination on the basis of race is a basic corollary of this command." United States v. Guest, 383 U.S. 745, 780 (1966) (Brennan, J., concurring and dissenting).

Third, because the proposed legislation is predicated on the beliefs that racial differences cause differences in tastes and interests, and that such differences in tastes and interests should be promoted by programming directed at racially separate audiences, it implicates the Federal Government in encouraging the consciousness of racial distinctions. Rather than inducing the emergence of a truly integrated, multi-racial society, it lends the authority of the law to perpetuating the very racial divisions that have been so disastrous in the past. Such governmental action is constitutionally suspect insofar as it "may well serve to exacerbate racial and ethnic antagonisms rather than alleviate them." Bakke, 438 U. S. at 298-299 (opinion of Powell, J.). See, e.g., Palmore v. Sidoti, 466 U.S. 429, cannot directly or indirectly give effect to private bias in denying custody of a white child to an interracial couple); Reitman v. Mulkey, 387 U.S. 369 (1967) (State cannot be seen to sanction racially segre-

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23 (Cont.) Rostow, The Japanese American Cases -- A Disaster, 54 Yale L. J. 489, 504 (1945).

gated private housing market); Anderson v. Martin, 375 U.S. 399 (1964)(State may not encourage polarized voting patterns by designating candidates' race on ballots); Barrows v. Jackson, 346 U.S. 249 (1953) (State may not encourage racially restrictive covenants); Hughes v. Superior Court, 339 U.S. 460 (1950) (State interest in preventing discriminatory hiring sufficiently great to permit it to ban picketing designed to force employer to hire by racial quotas); Wright v. Rockefeller, 376 U.S. 52, 66-67 (1964) (Douglas, J., dissenting).

Many of our arguments against the racial preferences of S. 1277 apply straightforwardly to that bill's proposed gender preference, and need not be repeated in detail. Like the racial preference, the gender preference cannot purport to remedy discrimination by the governmental entity involved. Again, the legislation cannot be justified as a means to promote "diversity." The assumptions that males and females have gender-specific interests in media programming, and that the gender of media owner/operators will predetermine their broadcasting choices, are merely "unsupported generalizations about the relative interests and perspectives of men and women" of the very kind which the Supreme Court has condemned. See Roberts v. United States Jaycees, 468 U.S. 609, 627 (1984) (unfounded claim of male/female divergences held insufficient to protect voluntary association's ban on female members); see also Hishon v. King & Spaulding, 467 U.S. 69, 81 (1984) (Powell, J., concurring) (qualities of mind needed for admission to law partnerships are unrelated to race or sex); Steele v. F.C.C., 770 F.2d at 1199. Cf. Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1083 (1981); Dothard v. Rawlinson, 433 U.S. 321, 344 n. 2 (1977) (Marshall, J., concurring in part and dissenting in part).

Although the Supreme Court has not held that legalized gender distinctions require the same strict scrutiny under the Fourteenth Amendment that racial classifications do, it has held that gender distinctions "must serve important governmental objectives and must be substantially related to the achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976). Moreover, the Court has held that exactly the same standard must be applied whether the classification is claimed to benefit men or women. See Mississippi University for Women v. Hogan, 458 U.S. 718, 197 (1982); Orr v. Orr, 440 U.S. 268, 279 (1978). The burden lies on the party advocating unequal treatment by gender to produce an "exceedingly persuasive" justification for it. Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981).

The proposed legislation cannot survive these tests. Although its apparent aim of promoting program diversity does describe a governmental objective of importance, the use of gender in the licensing process is simply not a suitable means to that end. In essence, the legislation treats gender, which is not in itself relevant to program diversity, as a proxy or surrogate for another characteristic that is related to that objective--gender is assumed to signal a propensity to produce pro-

gramming of distinctive interest to women. But even if gender did have some demonstrable correlation with this other characteristic (an assumption which there is every reason to doubt), it would still be unconstitutional to make gender a basis for unequal treatment, since the cases "have consistently rejected the use of sex as a discriminatory factor even though the statutes certainly rested on . . . predictive empirical relationships." Craig v. Boren, 429 U.S. at 202. And as a general rule, the Government cannot constitutionally make gender a surrogate for another characteristic when it is feasible to detect that other, more relevant, characteristic in itself. See Frontiero v. Richardson, 411 U.S. 677, 690 (1973) (plurality opinion). The Commission can readily design a comparative licensing proceeding, without gender preferences, in order to ascertain whether individual applicants, male or female, are particularly well suited to be granted a license.

In sum, Title IV of S. 1277 suffers from grave constitutional infirmities. Therefore, for the reasons stated, we emphatically recommend against its adoption, and as with Titles I and III, will recommend presidential disapproval if enacted.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

John R. Bolton
Assistant Attorney General

QUESTIONS OF SENATOR INOUYE AND THE ANSWERS OF MR. JAMES L. WINSTON

1. Mr. Winston, can you tell the Subcomittee what led the Commission to adopt its minority and female preferences?

NABOB Response: The Federal Communications Commission adopted its minority enhancement credit policy in comparative hearings as a result of instructions from the United States Court of Appeals. In the Case of TV 9 vs. FCC the U.S. Court of Appeals for the D.C. Circuit in 1973 directed the Federal Communications Commission that it should give special consideration to the ownership and control by minority applicants when issuing construction permits for new broadcast stations. The Court reasoned that the FCC's statutory obligation to assure diverse ownership of broadcast facilities would be furthered by considering the minority status of persons applying to own and control media properties, because such ownership could be expected to lead to the provision of diverse viewpoints in the editorial and programming policies of the stations.

The Commission complied with the Court's decision and proceded in subsequent cases to award an enhancement credit in the comparative evaluation of applicants if the applicant was owned and controlled by minority individuals. In 1978, recognizing that women also experience a degree of discrimination in our society, the Commission expanded the policy to provide an enhancement credit of lesser weight to applicants owned and controlled by females. The minority and female enhancement credits are cumulative and a minority female receives credits for her status in both categories. The Commission enforced these policies consistently in its comparative hearing processes without question until 1981 when then-Chairman Mark Fowler first argued that such policies are unconstitutional. The Fowler view on this subject apparently has become the majority view at the FCC.

2. Mr. Winston, can you tell me how many stations the Commission has licensed to minorities under the preference policy? Under the tax certificate and distress sale policies?

NABOB Response: We do not have figures for the number of stations the Commission has licensed pursuant to the minority enhancement credit policy. The FCC does not keep records, and we have no way of monitoring that information independently. Fortunately with respect to distress sales and tax certificates, the FCC Consumer Assistance and Small Business division does keep records of these, and I have attached to this Response the most recent information which we have from the FCC on the number of tax certificates and distress sales issued since the policies were adopted in 1978.

3. Mr. Winston, does your organization maintain any data on how long minorities and women hold stations after acquiring them?

NABOB Response: We do not have formal data on the length of time minorities hold stations after acquiring them. However, because of the small number of Black owned broadcast stations (approximately 165 stations owned by approximately 100 companies), as the Executive Director I am able to monitor the overall turnover in the industry. It has been my experience that Black owners, in general, tend to hold their stations much longer than three years. Further, when minorities sell stations in less than three years, it is often because they have purchased an inferior facility with technical problems which prevent it from being competitive. In such circumstances minorities have often been required by financial hardship to transfer stations in less than three years. It is rare for a Black station owner to sell a station in less than three years for a significant profit.

4. Mr. Winston, can you provide the Subcommittee with any information concerning the number of stations owned by minorities that actually broadcast programming geared towards minorities?

NABOB Response: NABOB does not keep formal information on the programming formats of our member stations. However, the National Association of Broadcasters Office of Minority and Special Services conducted a survey and their information showed that approximately 85% - 95% of Black owned stations broadcast programming geared toward the Black community. The results of the NAB survey are consistent with the informal information which I have received based upon my direct contact and conversations with our members and the information which our member stations provide to me.

5. Mr. Winston, there was a recent article in the Washington Post about the sale of WTVT to a corporation which is said to be controlled by a minority. The seller of that station was awarded a tax certificate, pursuant to the distress sale policy. However, the minority partner did not contribute any equity capital and there is a buyout provision which is effective in two years. Are such arrangements common? Do you believe this sale forwards the objectives of the distress sale policy?

NABOB Response: I am familiar with the Washington Post article concerning the sale of television station WTVT in Tampa, Florida. It is a fair characterization of that sale to say that it raises questions about whether the minority partner who purchased that station is, in fact, in control of the station. Given that he apparently put up no signicant equity capital for his purchase of the station and there is a provision for a buyout of his entire interest within two years, there is reason for concern that the minority partner may not in fact be in control of that station. Obviously a determination on whether or not the minority partner is in control would require a detailed investigation of the partnership. NABOB has done no detailed investigation of the partnership and therefore would not wish to venture an opinion upon whether the purchase is a bona fide minority purchase.

I point out, however, that the WTVT deal is unique, and this is the first instance of which I am aware in which the purchase of a station by a minority pursuant to the tax certificate policy has been drawn into serious question. The vast majority of companies taking advantage of the tax certificate and distress sale policies are 100% minority owned, and therefore no questions concerning minority control are raised in those instances. To the extent a situation such as WTVT raises questions about possible abuses of the tax certificate policy, such sales obviously are not beneficial to the objectives of the policy. However, when questions are raised, the solution is clearly not to change or abolish the tax certificate policy. The proper solution is to identify those specific instances in which questions have been raised and for the Commission to exercise its discretion to require additional information concerning the underlying agreements and partnership structure. The FCC had such authority with respect to WTVT, but chose not to exercise that authority. Therefore, if there is criticism which should be directed to the WTVT transaction, that cricitism should be directed to the FCC and not to the tax certificate policy itself.